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EXPECTATION OF HAPPINESS

Nemo ante mortem beatus

"A SOCIAL question, turning upon the character of English society and the whole theory of politics in this country" —this is how Scott, L.J., in *Ellis* v. *Raine*,[1] characterised the problem of "expectation of life" which, after a chequered career of six years, has now been given a solemn funeral by the House of Lords in *Benham* v. *Gambling*.[2] The learned Lord Justice might have added that the doctrine, commonly known as that of "expectation of life," may serve as an example of what happens if the law tries to overstep the boundaries of its own effectiveness, and of the limitations of judge-made law in particular. It is worth while, once more, to retrace the brief, but dramatic history of the doctrine, and to attempt an evaluation of the lessons which can be drawn from its rise, its decline, and its fall.

It was said by high authority[3] that there was nothing novel in the decision of Acton, J., and the Court of Appeal in *Flint* v. *Lovell*.[4] The loss of expectation of life, so it was said, had "always

[1] [1939] 1 All E.R. 104, at p. 107.
[2] [1941] A.C. 157.
[3] Lords Atkin and Wright in *Rose* v. *Ford*, [1937] A.C. 826, Lewis, J., in *Morgan* v. *Scoulding*, [1938] 1 K.B. 786, Langton, J., in *The Aizkarai Mendi*, [1938] p. 263, see, however, Greer, L.J., in *Shepherd* v. *Hunter*, [1938] 2 All. E.R. 587, at p. 589: "Until the decision in *Flint* v. *Lovell*, [1935] 1 K.B. 354, it was not thought (notwithstanding the view that the House of Lords took in *Rose* v. *Ford*) that the diminution in the length of life of an injured person could give rise to a claim for damages, even when occasioned by the wrongful act of the defendant."
[4] [1935] 1 K.B. 354.

been a usual element in the assessment of damages in such cases,"[5] and Lord Wright mentioned the reference by Field, J., in *Phillips* v. *London and South Western Railway Company*[6] to the "prospect of a speedy death" as one of the elements to be taken into account by the jury as proof of the traditional policy of the common law to regard the shortening of a man's life as a head of damages. Continuity is, of course, the very life-blood of the common law, and learned judges have always been reluctant to admit that their decisions involved new departures or changes in policy.[7] We venture to submit that, despite these dicta, there was a new departure involved in the idea of assessing the value of the expectation of life as part of the loss suffered by an injured person, although the innovation does not date further back than to 1936 and 1937 when the Court of Appeal and the House of Lords decided the case of *Rose* v. *Ford*.[8]

At the outset it is necessary to remind the reader of the dual meaning which the phrase "expectation of life" is capable of bearing. The knowledge of the fact that bodily injuries will have the effect of shortening a man's life is bound to aggravate the pain and suffering caused by the accident. The prospect, expectation, or anticipation of an early death is just as much part of the victim's mental suffering as the loss of a limb or of his eyesight. If a judge or jury take the view that a man should be awarded damages to make up for the suffering thus caused, they apply what Lord Roche[9] and Lord Simon[10] call the "subjective" test. With this purely psychological view we must contrast the theory that—anticipation or no anticipation, knowledge or no knowledge—the loss of a span of life is the loss of an asset, of an "objective good," and that damages can be recovered for it, just as they can be recovered for the loss of any tangible asset, without any reference to the psychological effect of the loss on the loser. It was this "objective" theory which was accepted by the House of Lords in *Rose* v. *Ford*.

It is obvious that the application of the subjective test would not have involved any innovation. The *solatium* which is included in a claim for damages for personal injuries, the compensation for pain and suffering, must naturally be increased, if, in addition to his physical pain, the victim is made to suffer the prospect of an early death. There is nothing either illogical or unjust in the

[5] *Per* Lord Atkin in *Rose* v. *Ford*.
[6] (1879), 5 Q.B.D. 78.
[7] Lord Macnaghten's famous speech in *Nordenfeldt* v. *Maxim, Nordenfeldt & Co., Ltd.*, [1894] A.C. 535, is the *locus classicus* for this phenomenon.
[8] [1937] A.C. 826.
[9] In *Rose* v. *Ford*.
[10] In *Benham* v. *Gambling*.

idea of giving an additional modicum of compensation to a man who is reduced to this state. The money he receives from the wrongdoer may enable him to enjoy some of the good things of life during the years left to him, and this may help him to forget that he has lost the prospect of an old age.

This, and no more, it is submitted, was decided in *Phillips* v. *L.S.W. Rly. Co.* It is worth while to quote a short passage from the summing up of Field, J.,[11] in order to see just in what context the ill-fated phrase "prospect of a speedy death" made what was perhaps its first appearance in English law—

"You will have to consider under the head of damages, first of all, the *pain and suffering* to him (the plaintiff). That, of course, is a matter which you must take into account as it is a fair matter for compensation. An active, energetic, healthy man is not to be struck down almost in the prime of life, and reduced to powerless helplessness *with every enjoyment of life destroyed and with the prospect of a speedy death*, without the jury being entitled to take that into account, not excessively, not immoderately, not vindictively, but *with the view to giving him a fair compensation for the pain, inconvenience and loss of enjoyment which he has sustained.*"

Field, J., then, regarded what we now call "loss of expectation of life" merely as part of the pain and suffering for which the jury was to assess compensation. There is not a vestige of the objective theory in this charge to the jury. The learned judge might have used the word "fear" or "anticipation" instead of "prospect" without changing the meaning.

The judgment of Cockburn, C.J., in the Queen's Bench Division on the motion for a new trial[12] contains the following passage—

"We think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account *all the heads of damage* in respect of which a plaintiff complaining of a personal injury is entitled to compensation. *These are: the bodily injury sustained; the pain undergone; the effect on the health of the sufferer*, according to its degree and its duration as likely to be temporary or permanent; *the expenses . . .; the pecuniary loss. . . .* If a jury have taken all these elements of damage into consideration . . . the Court ought not . . . to disturb their verdict."

Again, not a word about expectation of life in what is intended to be an exhaustive enumeration of the headings under which a jury may and should award damages in personal injury cases. Nor was there anything about it in the judgments of the Court of

[11] (1879), 5 Q.B.D. at p. 80. Throughout this paper the italics are the present writer's.

[12] (1879), 4 Q.B.D. at pp. 407–8.

Appeal,[13] in the summing up of Lord Coleridge, C.J., at the new trial, or in the judgments of either Grove, and Lopes, J.J., in the Common Pleas Division, or of Bramwell, Brett, and Cotton, L.JJ., in the Court of Appeal in the proceedings following the new trial.[14] The only item mentioned in all these judgments, apart from the purely pecuniary damages is "pain and bodily suffering."

Neither the decision of Acton, J., nor the judgments given in the Court of Appeal by Greer, Slesser, and Roche, L.JJ., in *Flint* v. *Lovell* contradicted this subjective or psychological interpretation of the term "expectation of life." Indeed, Roche, L.J., as he then was, who did not dissent on this point,[15] said that the shortening of life was relevant to the measure of damages, *inter alia*, "because impending death and the weakness preceding it and *the knowledge of these conditions* naturally produce or increase the pain and suffering. . . ." But, then, the plaintiff in *Flint* v. *Lovell* was a man of 69 who survived the accident and was fully conscious of its possible consequences. It was not, therefore, necessary for the Court expressly to say whether it accepted the objective or the subjective test. The first act of this judicial drama, the case of *Flint* v. *Lovell*, ends with an unsolved question. One day, the question would have to be answered and the crucial case would be that either of a child or an insane person—incapable of appreciating the meaning of the shortening of his life—or that of a person killed instantaneously or without having recovered consciousness.

This latter case, of course, could not have arisen before the Law Reform (Miscellaneous Provisions) Act, 1934, which abolished (with certain exceptions) the rule *actio personalis moritur cum persona*. *Flint* v. *Lovell* might have remained a decision of little consequence, had it not been for the survival of the cause of action under the 1934 Act. The case of a child crippled but not killed by the negligence of another person might not have necessarily given rise to the problem of the objective or subjective test, because it might have been argued that in later years the child would acquire full consciousness of the loss, and the case of the lunatic might never have arisen.[16]

It was in *Slater* v. *Spreag*[17] that the crucial question had to be decided for the first time. The victim was knocked down by a motor car, severely injured, and at once rendered unconscious.

[13] (1879), 5 Q.B.D. 78.
[14] (1879), 5 C.P.D. 280.
[15] See his speech in *Rose* v. *Ford*.
[16] All the cases of children decided and reported after 1935 were cases of fatal accidents.
[17] [1936] 1 K.B. 83.

He died two days later without having recovered consciousness. MacKinnon, J. (as he then was), refused to award damages for "shortening of life." He took the view[18] that, in *Flint* v. *Lovell*, damages "were awarded for the subjective effect upon the plaintiff from his knowing that his expectation of life was shortened. If a man does not retain consciousness, I do not think that any damages for the shortening of his life can be awarded. Those damages are for the effect on his own mind of his knowledge that instead of being a healthy man he is a crippled wreck. It is the fact that he is so mentally distressed that is the ground for compensation."

This decision was followed by Humphreys, J., in *Rose* v. *Ford*,[19] a case, it will be remembered, in which a girl of 23 was injured in a road accident. She died after four days, during which she had been in an almost continuous coma, and it was assumed that she never became conscious of the inevitable shortening of her life.

This case went before the Court of Appeal and before the House of Lords, and the problem left open in *Flint* v. *Lovell* had now to be solved. Both Courts unanimously rejected the subjective view and held that the loss of life was the loss of an asset which had to be valued without any reference to the victim's awareness of the loss.

We must pause for a moment to consider what was involved in this decision in favour of the objective test.

It is commonplace that in the parlance of the common law the word "damages" connotes two very different things. Damages are either in the nature of a compensation or in the nature of a penalty. (They may be both.) In the first case, the sum awarded bears some relation to the injury suffered by the plaintiff. This injury may either be the loss of some "good" of which the plaintiff has been deprived, land, a tangible or intangible movable, money he had to spend or he has been prevented from earning, etc., and—this is vital—which is capable of pecuniary evaluation. The function of damages in this case is, roughly, to restore the plaintiff to the financial position in which he would have been if the damaging event had never occurred. The compensation is commensurate to the asset lost, and it would be ludicrous to pay any attention to the victim's own attitude towards the "good"

[18] At pp. 88–89. When in the Court of Appeal, the learned Lord Justice left no doubt that he was "perfectly incapable of forming an estimate as to what is the proper amount" and expressed his disapproval of the doctrine in unmistakeable terms. See his judgments in *Bailey* v. *Howard*, [1939] 1 K.B. 453, and in *Gambling* v. *Benham*, [1940] 1 All E.R. 275, at p. 278.

[19] [1936] 1 K.B. 90, [1937] A.C. 826.

of which he has been deprived. Diogenes has the same claim to be indemnified for the loss of the good things of this earth which he despises as has Alexander who values them highly. However, if the injury suffered is incapable of being measured in terms of currency, all that damages can do is to give some measure of mental or spiritual satisfaction in order to make up for the plaintiff's discomfort. It is reported that the Stoic philosopher Poseidonios, when he was tormented by pain, exclaimed: "Pain, thou shalt not defeat me. I shall never admit that thou art an evil." How could he have recovered damages for "pain and suffering," if to him the suffering of pain was not an injury, but an adiaphoron, something indifferent to his well-being? How could the award of any damages, however high, have been a "compensating comfort" to him, when, perhaps, he welcomed his misery as a test of his own power to resist it? There is no objective standard, save money, by which losses can be measured, and, failing this standard, there is no measuring rod, except the plaintiff's own attitude towards his injury, and the sole question is: what (within reasonable limits) can money do in order to alleviate the plaintiff's suffering, and to give him some modicum of satisfaction? There is, then, nothing in this traditional view of compensatory damages to force a judge or jury to "square the circle," to measure the immeasurable, and to assess the value of things transcendental in Pounds, Shillings, and Pence. Needless to say, all this has nothing to do with penal or exemplary damages. Compensatory damages, whether pecuniary or by way of *solatium*, are always commensurate to the injury, whether they are measured by objective or subjective standards, but in the case of exemplary damages the test is "not only what the plaintiff ought to receive, but what the defendant ought to pay."[20] It is greatly to be regretted that there is no adequate translation for the terms *actio reipersecutoria* and *actio pœnalis*.

All this is elementary, but it is only against this background that the problem of expectation of life or expectation of happiness can be seen in its true perspective. When, in *Rose* v. *Ford*, the House of Lords held that "impaired health and vitality" are "not merely . . . a cause for pain and suffering but . . . a loss of a good thing in itself,"[21] they laid the foundation stone to all the

[20] Cockburn, C.J., in *Phillips* v. *L.S.W. Rly. Co.*, at p. 409.

[21] *Per* Lord Roche. Lord Atkin did not deem it necessary "to say that a man has a personal right, of the nature of property, in his life, so that, when it is diminished, he loses something in the nature of valuable property. I do not say that this is not so, but I am satisfied that the injured person is damnified by having cut short the period during which he had a normal expectation of enjoying life, and that the loss, *damnum*, is capable of being estimated in terms of money." And see Lord Wright, quoted below, p. 92.

difficulties which followed, and which, less than five years later, compelled the House, in *Benham* v. *Gambling*, to do what was possible within the principle of *stare decisis* in order to eliminate the effect of *Rose* v. *Ford*. The objective theory, of course, had come to stay and will, as a theory, remain part of the law, until Parliament finds the time to put this branch of the law on a rational footing.[22]

In assuming the task of measuring the value of life or of "happiness" in terms of money, the law has transgressed the boundaries of its province. Or, to put it in another way, the Courts have blurred the border line which separates the criminal from the civil law. They have reintroduced something very much like the crude and atavistic idea of the *wergeld*,[23] adequate perhaps to a community which was in the state of transition from the system of blood-feud to that of the state monopoly of criminal justice, but hardly appropriate in a society in which the principal function of the civil law is to create certainty and to render the consequences of human conduct "calculable." No wonder that the certainty of the law was impaired[24] and that in every single case decided after *Rose* v. *Ford* learned judges commented on the almost insuperable difficulties with which the task of assessing damages for loss of expectation of life confronted judges and juries.[25] Hopes were expressed[26] that the "common sense of juries" might gradually work out "the amounts that in English civilisation to-day are reasonable for that particular head of damages," and in their despair the Courts clung to the £1000 awarded by the Court of Appeal in *Rose* v. *Ford* as a sheet anchor,[27]

[22] The objective test was re-emphasised by Lord Simon, in *Benham* v. *Gambling*. It may, however, be noted that in *Feay* v. *Barnwell*, [1938] 1 All E.R. 31, decided after *Rose* v. *Ford*, Singleton, J., dealt with pain and suffering and loss of expectation together, and saw "no necessity to state how (the sum) is apportioned under the respective heads of damage, unless there is some particular reason why I should be asked to do so."

[23] See Maitland, *Domesday Book and Beyond*, p. 44: "The sons of a villanus who had but two oxen must have been under the temptation to wish that their father would get himself killed by a solvent thegn." And see Holdsworth, *History of English Law*, Vol. I, p. 22.

[24] In *Gambling* v. *Benham*, [1940] 1 All E.R. at p. 279, Goddard, L.J., commented on "the great divergence of judicial opinion . . . on what is the proper sum to be awarded," and called for the intervention of the legislature. See also Scott, L.J., in *Ellis* v. *Raine*, above.

[25] In *Mills* v. *Stanway Coaches, Ltd.*, [1940] 2 K.B. 334, Goddard, L.J., said: "When one is dealing with an almost metaphysical subject, one cannot approach it from the point of view of what is the value to be put on human life. The only guide is to be moderate. . . . To seek for a mean, a normal, or an average, where there is really no guide is very like the illustration given by Lord Bowen of a blind man looking for a black cat in a dark room."

[26] Scott, L.J., in *Bailey* v. *Howard* and in *Ellis* v. *Raine*.

[27] For an example see the judgment of Singleton, J., in *Feay* v. *Barnwell* at pp. 33–34. See also the remarks of Slesser, L.J., in *Mills* v. *Stanway Coaches*, above.

but it was just this quantification on the basis of the assessment in *Rose* v. *Ford* which necessitated a revision of the whole problem in *Benham* v. *Gambling*. In the absence of anything like a "scale" and of any guidance as to the criteria of valuation—except the constant imploration to be fair, moderate, reasonable, and to "err on the small side"[28]—this singularly unscientific method of solving an insoluble problem by "empirical" means,[29] and as "a matter of impression,"[30] had to come to grief.

The appeal to the "common sense of the jury"[31] sounds very much like the imprecation of a divinity by a magician in despair. To what exactly was that much-vaunted superior—or average—wisdom of the twelve reasonable men to be applied? The assessment of damages by a jury is justified where the jury can act as a tribunal of fact, where it is their function to bring their practical experience to bear on such questions as the price and pecuniary value of an object, the likelihood of the loss of wages or profits, etc. It may also be justified where the jury, using their own introspective experience and the evidence before them, are called upon to estimate the mental distress caused to a victim and the amount which is likely to alleviate it. It may finally be justified where there is no pretence of any valuation at all, and where the amount of the damages awarded is intended to signify the degree of abhorrence with which a group of average men reacts to the perpetration of a wrongful act, i.e. in the case of exemplary damages. He who commits such an act puts himself, as it were, "beyond the pale" of that province of the law within which he can count upon the calculability of his risks, he must submit to the *liberum arbitrium* of a body which need not and cannot even give an account of the motives that prompted its verdict. But how can this verdict fill the gap left by the complete lack of any correlation between a "good" to be valued and the unit of measurement in which the value is to be expressed? A mathematician, despairing of the problem of squaring the circle, would be equally justified if he left the exact numerical determination of the ratio between the diameter and the circumference of the circle to twelve men, and called it "the empirical method." He might then rejoice in having obtained "a happy medium and a

[28] Scott, L.J., in *Bailey* v. *Howard*.

[29] Scott, L.J., *l.c.*

[30] Goddard, L.J., in *Gambling* v. *Benham*, at p. 280: "I do not know what principle to apply. . . . It must be largely a matter of impression."

[31] Lord Wright in *Rose* v. *Ford*: "The jury should be directed that they are entitled to take into consideration with other relevant elements of damage, using their common sense to give what is fair and moderate in view of all the uncertainties and contingencies of human life." Lord Roche called the jury "a most admirable tribunal for this purpose."

business result,"[32] but he could hardly claim that the result of his endeavours had any affinity to a valuation. "What is life going to be worth to a young woman with the prospects of the fulfilment of the natural expectation of natural life?"[33] "Worth," that is, expressed in terms of money? A question, with great respect, that no mortal being should ever be called upon to answer, a question, perhaps, for the Delphic Oracle whose verdicts derived their validity from divine inspiration—but which is so utterly beyond the reach of "common sense" and of human reason that the mere attempt to answer it touches the borderline of blasphemy.[34] Yet—we have the authority of Lord Wright[35] for the proposition, not only that "a man has a legal right in his own life . . . a legal right that his life should not be shortened by the tortious act of another," but also that "his normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given."[36]

Attempts have not been missing to find rational criteria for the determination of this "value." These criteria had to be of an objective character, and the question was not, at what price the victim would have sold the prospect of an old age. "We are not to give him as damages the price that he would have accepted in exchange for the life which he preferred to go on living."[37] There are, on the other hand, no market values for life and happiness, and the Courts were thus faced with the "distasteful task"[38] of inventing standards of measurement.

Is the length of the life lost of any relevance? From every point of view—practical as well as theoretical—this is evidently the most important question.[39] In practice a considerable proportion of the cases which came before the Courts were cases of children, killed in motor accidents.[40] Was the compensation

[32] Greer, L.J., in *Shepherd* v. *Hunter*.

[33] Lord Roche in *Rose* v. *Ford*, Greaves-Lord, J., in *Trubyfield* v. *G.W.R.* (1937), 158 L.T. 135.

[34] It is hardly necessary to point out that in life assurance the sum for which a man insures his own life does not bear any relation to a valuation. Life assurance is not a contract of indemnity. In those cases in which the Life Assurance Act, 1774, sets an upper limit to the amount for which a man may affect an insurance upon the life of another, the criteria determining that maximum amount are of a strictly pecuniary nature.

[35] In *Rose* v. *Ford*.

[36] Lord Wright also said that "it would be paradoxical if the law refused to give any compensation at all, because none could be adequate."

[37] Lord Roche in *Rose* v. *Ford*, Greer, L.J., in *Roach* v. *Yates*, [1938] 1 K.B. 256.

[38] Langton, J., in *The Aizkarai Mendi*, above.

[39] The question was treated as a question of law by the Court of Appeal in *Berridge* v. *Everard*, [1938] 1 All E.R. 717, where (before the decision in *Benham* v. *Gambling*) the remission of a case of this type to the County Court was disapproved by the Court, because it raised a difficult point of law.

[40] *Trubyfield* v. *G.W.R.*, girl of eight; *Shepherd* v. *Hunter*, child of three; *Bailey* v. *Howard*, girl of three; *Gambling* v. *Benham*, boy of two and a half.

payable to the child's personal representative to be assessed by inverse ratio to the age of the child? So that the financial benefit to the estate, i.e. in practice the parents, would be largest if the person killed was a newly-born baby, and considerably smaller in the case of a schoolboy? Leaving aside for a moment this practical aspect of the question, we can see that we are here touching the very core of the problem viewed from the standpoint of the classification of the "asset" lost. If this asset is really the "expectation of life," then there is no way out of the consequence that, *ceteris paribus*, the younger the victim, the larger the compensation. If, on the other hand, this consequence is to be rejected, then the asset lost cannot be simply the expectation of life, but must be something else, something inexpressible in terms of human language, something which Lord Simon, in *Benham* v. *Gambling*, called "a positive measure of happiness."

After the decision in *Rose* v. *Ford* the general view of the profession seems to have been that what was to be estimated by the judge or jury was in fact the expectation of life, i.e. the value of a number of years lost to the victim. The task of valuation, then, was capable of being split in two: the counting of the number of units (years) lost, and the assessment of the value of each unit. There arose the additional complication that it was not altogether clear whether the units were equal in value and whether the years of early childhood, the prime of life, and old age were equivalent in terms of human happiness.

There is nothing irrational in estimating the expectation of life as such. In fact, this is a mathematical rather than a legal problem, and the temptation was great to introduce into this wholly irrational and unscientific matter an element of logic by allowing the number of years lost to be determined by the science of mathematical statistics. Slesser, L.J., was inclined to use "the actuarial expectation of life" as "something to start with."[41] But, even before the House of Lords had decided *Benham* v. *Gambling*, this test was almost universally rejected. The reasons given for this rejection were not convincing. It was said, for example,[42] that the actuarial tables "do not seem to be compiled with a real appreciation of the ordinary incidents of life. They are compiled in an abstract way from average, and do not, in my view, really reflect the true picture." But, with respect, how can one arrive at the "true picture" otherwise than by averages, unless one claims to be in possession of prophetic gifts? The only

[41] In *Roach* v. *Yates*, and similarly in *Shepherd* v. *Hunter*, and in *Gambling* v. *Benham*.

[42] By Greaves-Lord, J., in *Trubyfield* v. *G.W.R.*

way of calculating probabilities is the mathematical way.[43] The child who lives "in a country village off the main road, where the risk of being exposed to road dangers and to certain diseases would be less than in a crowded centre,"[44] might have moved to London or Manchester next year, if he had lived. The man who was employed as a miner or a sailor and exposed to grave occupational risks might have decided to become a farmer, and the farmer might have become a rear-gunner in a bomber. Statistical tables are made up so as to include the probability of the happening of these things—insofar as they can be calculated at all. They represent the maximum of what can be done by way of calculating the "contingencies of every kind."[45] Yet, *Benham* v. *Gambling* lays it down that no attention must be paid to these tables. "Arithmetical calculations are to be avoided."

Even where, before *Benham* v. *Gambling*, the actuarial test was rejected, it was generally held that "the age factor cannot be entirely negligible."[46] The best example is afforded by the most instructive case of *The Aizkarai Mendi*.[47] Nine men, between the ages of 23 and 44, had been killed in a collision at sea caused by the defendants' negligence. The Admiralty Registrar took the view that the damages for loss of expectation ("the standard of the amount of enjoyment which they might be expected to have derived from their calling and circumstances") should be the same in all the nine cases. But Langton, J., while "very loath . . . to stray still further than the Registrar has been forced to do along the dangerous path of analysis and segregation," and fully appreciating that the "age or time factor is not to be handled arithmetically," could not bring himself "to believe that in any question of expectation of life the factor of age can be entirely negligible. . . . The very notion of expectation seems to me to connote time, and, if the good which forms the subject of expectation is rated equal over a given number of cases, the time factor seems to me necessarily to assume importance." *Ceteris paribus*, "the expectation of life of the younger man must exceed that of his elder," and he described this as a question not of quantum, but of principle. He divided the men in three groups, those over twenty, those over thirty and those over

[43] Lord Simon said in *Benham* v. *Gambling* that "figures calculated to represent the expectation of human life at various ages are averages arrived at from a vast mass of vital statistics. The figure is not necessarily one which can be attributed to a given individual." Yet, this is precisely what insurance companies do every day when calculating their premiums. What figure can be "attributed to a given individual" except one which is derived from the mathematical laws of probability, or else from a pure guess?

[44] Like the child in *Benham* v. *Gambling*.

[45] Slesser, L.J., *in Roach* v. *Yates*.

[46] Slesser, L.J., in *Mills* v. *Stanway*.

[47] [1938] P. 263.

forty, and awarded £400, £350 and £300 to the estate of each member of the three groups respectively.

This view was of decisive importance in the case of children. The courts were inclined to regard the £1000 awarded in the case of a girl of 23 in *Rose* v. *Ford* as the barest minimum in the case of infants. They did take into account, in the case of very young children, the additional risks involved in children's ailments and in road accidents,[48] but the Court of Appeal[49] ordered a new trial in a case in which the jury had assessed the value of the life of a child of three at £90, although the child was exposed to all the road dangers of Manchester,[50] and dismissed appeals in cases in which the values of lives of children of three and two and a half had been assessed at £1000 and £1200 respectively,[51] while Greaves-Lord, J., assessed the value of the life of a girl of eight at £1500.[52] This simple enumeration looks at first sight, as if some consistent theory of assessment had been evolved at the time when *Benham* v. *Gambling* came before the House of Lords, but this was not the case. Learned judges could not arrive at an agreement with regard to the value of the early years of a man's or woman's life. These discussions centred around a dictum of Lord Wright in *Rose* v. *Ford*: "Special cases may occur such as that of an infant, or an imbecile, or an incurable invalid, or a person involved in hopeless difficulties." What was the common denominator between the infant and the unfortunates mentioned in the same sentence? Surely not that they were "in the same class of case."[53] Nor could it merely mean that mathematical considerations were to be excluded,[54] because they were to be excluded even in a "normal" case. The dictum had to be interpreted as a reference to the intrinsic value of the years of childhood.[55] The depreciating factor was considered to be[56] the fact that it is "far more difficult to say what his chances of the advantages of human life are. . . . With an infant, one does not know that its parents will live or that it will have an education." One would have thought that

[48] See Slesser, L.J., in *Gambling* v. *Benham*, Greer, L.J., in *Shepherd* v. *Hunter*, Greaves-Lord, J., in *Trubyfield* v. *G.W.R.*, Langton, J., in *The Aizkarai Mendi*.

[49] In *Shepherd* v. *Hunter*.

[50] For the time being. It might have "ended life in some happy rural area, listening to nothing but farmyard sounds and smelling sweet odours" (*per* Slesser, L.J.).

[51] *Bailey* v. *Howard*, *Gambling* v. *Benham*.

[52] *Trubyfield* v. *G.W.R.*

[53] Slesser, L.J., in *Gambling* v. *Benham*.

[54] Slesser, L.J., in *Shepherd* v. *Hunter*.

[55] This was not the view of Greaves-Lord, J., who in *Trubyfield's* case said: "those fifteen years (between eight and twenty-three) embody that portion of life which is thought by many to be the happiest portion of life. . . . In my view they are just as much entitled to be called 'a good thing' as a life of full age is entitled to be called 'a good thing.'"

[56] By Goddard, L.J., in *Gambling* v. *Benham*.

the future career of the vast majority of infants was pretty well mapped out by their social environment, and not very dependent on the survival or otherwise of their parents. The question of education is settled by the state, and it is only a comparatively small minority of infants whose education and career can be affected by the individual conditions in which their parents are placed. Yet, this view prevailed, and it was finally laid down by Lord Simon in *Benham* v. *Gambling* that the figure of damages must be reduced in the case of a very young child because during the child's early years, up to the age of four or five, the child lacks "a coherent and continuous self-consciousness"—a factor held to impair the value of happiness during those years. But the main argument was that "there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made." Later "when an individual has reached an age to have *settled prospects*, having passed the risks and uncertainties of childhood and having in some degree attained to an *established character*, and to *firmer hopes*, his or her future becomes more definite, and the extent to which good fortune may probably attend him at any rate becomes less incalculable." It is more difficult to assess a child's prospect of happiness, therefore the value of that prospect is smaller than that of an adult—this is one of the principles with the help of which the House of Lords in *Benham* v. *Gambling* checked the "inflation of damages" which had been the inevitable consequence of *Rose* v. *Ford*.

As long as the time factor was allowed to influence the assessment, the age and health of the victim were obviously paramount considerations. So was his occupation, which might considerably impair his expectation if it involved him in special risks.[57] If the termination of the life in the near future is already a certainty, this will obviously greatly diminish the value of the expectation.[58] In fact, most of the factors which are used by statisticians for the scientific calculation of a man's expectation were used by lawyers for their unscientific calculation[59]—until the whole theory of expectation of life was exploded by *Benham* v. *Gambling*.

[57] Langton, J., in *The Aizkarai Mendi*. Additional war risks would be of importance. This is suggested by *Hall* v. Wilson, [1939] 4 All E.R. 85.

[58] Du Parcq, J., in *Smith* v. *Cawdle Fen Commissioners*, [1938] 4 All E.R. 64: "If a man is killed by somebody's negligence on a Monday, and it is proved to the satisfaction of the jury that he had been sentenced to death and would have been hanged on Wednesday, I think that it is absurd to suppose that his executors would recover the same damages as if he had been a person with a likelihood of long life."

[59] "I suppose every one has a sort of general notion of the likelihood of life and I suppose every one is a little inclined to look at the optimistic side" (Greaves-Lord, J., in *Trubyfield* v. *G.W.R.*).

What the House of Lords decided in *Benham* v. *Gambling* was that the "good" for the loss of which a victim or his estate could claim compensation was not the expectation of life at all, but the expectation of happiness. The age factor was not entirely eliminated, "in some cases" it "may be a relevant factor, for example, in extreme old age the brevity of what is left may be relevant"—but it was relegated into the background. "Damages should not be calculated solely, or even mainly, on the basis of the length of the life which is lost." "The thing to be valued is not the prospect of the length of days but the prospect of a predominantly happy life." The splitting of the problem in two—the counting of units and their subsequent valuation was disapproved by Lord Simon in unambiguous terms: "It is of no assistance to know how many years may have been lost unless one knows how to put a value on the years." This seems to imply that the amount of happiness vouchsafed by each single year is not equal to that given by another, and that, since there is no continuity of "enjoyability," the mere counting of unequal units is useless.

This decision puts the whole problem on a new basis. We have to evaluate the "measure of prospective happiness," lost by the victim. How can we do it?

What exactly do we mean by "happiness"? The *Oxford Dictionary* defines "happy" as "content with one's lot," from which it would seem to follow that the standard of measurement of happiness is entirely psychological and subjective, while, of course, the conception of "expectation" is objective according to the decision in *Rose* v. *Ford*. If we may venture a definition it would be something like "the objective circumstances which can be regarded as conducive to a state of contentment." These circumstances vary widely from case to case. Health is generally regarded as a *conditio sine qua non* of contentment,[60] but a neurasthenic, such as Molière's *Malade Imaginaire*, derives a positive measure of happiness out of the contemplation of his real or imaginary diseases. Personal safety and regularity of life may be middle class ideals, but they do not appeal to the heroically minded. Which is more valuable, the short career of the explorer who seeks his happiness in a supreme moment of self-realisation, or the long life of a bank clerk who keeps his ledger account day by day for fifty years? Whose happiness is more valuable, that of the brilliant but wicked painter or that of the virtuous but commonplace doctor in Shaw's play? And

[60] Lord Simon was aware of the fact that the damages for the unhappiness caused by a disabling injury may be larger than those for deprivation of life. This is an important effect of *Benham* v. *Gambling*.

what about the lunatic who lives in the continuous illusion that he is Napoleon after the battle of Austerlitz? Does he not enjoy a very considerable measure of happiness? What about the drug addict and the drunkard? On the other hand, "the fact that the injured man was of a suicidal tendency, or suffered from a defect of living might be material,[61]" the person of an "atrabilious temperament" whom Slesser, L.J., mentioned in *Roach* v. *Yates*[62] would, if he survived the accident, find to his surprise that his pessimism was more expensive than he might have assumed, and the same might be the experience of a man who thinks that he is better off in heaven, than he would be in this life.[63] There is no abstract answer to the question of what causes happiness.[64] All we can do is to look at the "character and habits of the individual" and see whether they were "calculated to lead him to a future of happiness or despondency,"[65] but we must not look further, though we may have suspected that war and peace, defeat and victory, crisis and prosperity, bad harvest and good, are not less potent elements than individual character and habits. The human type envisaged by Lord Simon is a self-contained monad —his prospects of contentment are ingrained in his personality, collective factors do not count. We are, however, invited not to indulge in undue optimism. "It would be fallacious to assume that all human life is continuously an enjoyable thing."[66]

One condition of happiness, though of an individual character, must be rigidly excluded from our considerations. We have seen that we are enjoined by authority to look upon the human being as an isolated individual. It follows that his place in society and especially his share in the worldly possessions of the community do not count. Wealth does not produce happiness, nor does poverty produce misery. This has now been laid down by high authority. We must shut our eyes to the fact that— apart from war—in modern society the most important single factor causing unhappiness is unemployment. The degree to which the individual is exposed to it is totally irrelevant to the measurement of his happiness, while we may pay attention to the

[61] Slesser, L.J., in *Shepherd* v. *Hunter*.

[62] But not the follower of Schopenhauer, although mentioned in this connection by the Lord Justice.

[63] Hawke, J., in *Dransfield* v. *British Insulated Cables, Ltd.* (1937), 54 T.L.R. 11.

[64] And no answer to the question whether a woman enjoys life more or less because she has four children—see Slesser, L.J., in *Mills* v. *Stanway Coaches*.

[65] Lord Simon in *Benham* v. *Gambling*.

[66] But we must look at the circumstances such as they were before the accident, and the wrongdoer has no right to rely on the diminution of happiness, for example, the bodily or mental injuries brought about by the accident itself, as a circumstance reducing the value of the victim's expectation of happiness. This is what the Court of Appeal decided in *Roach* v. *Yates*.

enjoyment he gets out of his work or the fulfilment of his duties.[67] But the social factors likely or unlikely to deprive him of this enjoyment must not be considered. "For this purpose there is to be no difference between the wife or child of the labourer and the wife and child of the millionaire."[68] "Social position or prospects of worldly possession" must not affect the amount of the damages to be awarded,[69] and we cannot quarrel with this practical result. It would indeed be monstrous if it was cheaper to kill a miner than an owner of mining royalties, it would savour too much of the *wergeld* of early feudal society. But there is a long way between accepting this as a principle of positive law and endorsing Lord Simon's appeal to lawyers and judges to "join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth and status." The social philosophy which inspires this statement is, it is submitted, untenable in view of the facts with which we are all familiar and indeed incompatible with the bulk of social legislation. The degree of happiness does depend on wealth and status, but for excellent reasons the law asks us to disregard this fact.

It may be a matter of surprise that at the very moment when the Courts proceed to the assessment of the value of happiness in terms of currency, they leave out of account the one and only element which is capable of a genuine quantification. How, we may well ask, can the award of money compensate the victim for his loss of happiness, if that happiness does not depend on wealth? But this contradiction is only apparent. The truth of the matter is that *Benham* v. *Gambling* constitutes a complete reversal of the policy established by *Rose* v. *Ford*. It is necessary, once more to refer to the speech of Lord Roche in the latter case in order to find the key to the real significance of *Benham* v. *Gambling*. In *Rose* v. *Ford*, Lord Roche "confessed to some apprehension lest this element of damage may now assume a frequency and a prominence in litigation far greater than is warranted in fact, and, by becoming common form may result in the inflation of damages *in undeserving cases*, or more probably perhaps, may become stale and ridiculous, to the detriment of *real and deserving cases*, such as the present. But the abatement of these possible evils may be left to the good sense of judges

[67] Greaves-Lord, J., in *Trubyfield* v. *G.W.R.* Lord Simon himself mentioned the fact that the father of the child was in steady employment, and Slesser, L.J., in *Mills* v. *Stanway*, regarded it as relevant that the victim "belonged to what used to be called, I suppose, that very useful part of the community, the lower middle classes."

[68] Goddard, L.J., in *Mills* v. *Stanway*.

[69] Lord Simon in *Benham* v. *Gambling*.

and juries. . . ." And the learned Lord warned of "abstruse thought and technicalities" and of what Langton, J., in *The Aizkarai Mendi* above, called "over-analysis." The apprehensions of Lord Roche proved to be far better founded than his confidence in the good sense of judges and juries.[70] The only way out of the "inflation of damages" was to abandon the "technicalities" of valuation altogether, and openly to admit that the criterion of assessment was the more or less "deserving" character of the case. Such a course, however, was precluded by the principle of *stare decisis* which compelled the House of Lords to cling to the fiction of a valuation. In order to render this fiction harmless, the House substituted for the expectation of life (which, through the presence of the age factor, contained an element of rational assessment) the expectation of happiness which, as Lord Simon admitted, is "in fact incapable of being measured in coin of the realm with any approach to real accuracy." It is obvious that it was only the principle of precedent which prevented the House from overruling *Rose* v. *Ford*. The policy laid down in that case was of an experimental nature, and the experiment failed, but the highest Court is prevented from doing what the Supreme Courts of most other countries could do in such a case: Admit the failure of the previous policy and overrule their previous decision. Instead of overruling it, they emasculated it—by eliminating all those elements which could tempt judges and juries to proceed to anything resembling a valuation.

The result, therefore, would seem to be that with *Benham* v. *Gambling* this head of damages has ceased to be of a compensatory nature, and that the disquisitions about the criteria of happiness are entirely theoretical. In effect, it is now—as a consequence of the virtual elimination of the age factor—determined by the more or less "deserving" character of the case. Courts and juries had, under the influence of *Rose* v. *Ford*, adopted the habit of "thinking in thousands"[71]—they were now made to think in terms of hundreds. The House of Lords corrected "the method of estimating this head of loss" and approved "a standard of measurement" which, it was hoped, would lead "to reduced awards," and to "very moderate figures." "I trust that the views of this House, expressed in dealing with the present appeal, may help to set a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy."

"A lower standard of measurement . . . for what is . . .

[70] See Goddard, L.J., in *Gambling* v. *Benham*.
[71] See Goddard, L.J., in *Mills* v. *Stanway*.

incapable of being measured." The emphasis, we submit, lies not only on the scaling down of the standard, it lies on the admission that "the truth, of course, is that in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or judge of fact is *attempting to equate incommensurables.*"

In *Cumper* v. *Pothecary*,[72] Goddard, L.J., referred to this as a "change of legal outlook," and the Court of Appeal refused to allow a plaintiff to take out of court, after the decision of *Benham* v. *Gambling*, a sum of more than £1050 paid into court by the defendant before the decision, thus recognizing that the House of Lords had, in fact, altered the law. It is true that this change in the law was primarily concerned with the quantum of damages which had been expressly left open in *Rose* v. *Ford*,[73] but, as we have tried to show, it did, in effect, substitute for the valuation of an asset the entirely irrational estimation of the more or less deserving character of the case.

The shortcomings of judge-made law are very apparent from these developments. In default of a scale of damages laid down by Parliament[74] and of a "tariff," previous decisions afford little assistance in the fixing of damages of this kind.[75] The Court of Appeal itself is in no way bound by its previous decisions as to quantum,[76] and in order to give the "guidance" demanded by judges of fact, the highest Court has to resort to what one is almost tempted to call the subterfuge of laying down a theory of valuation which involves in effect the complete jettisoning of all standards of rational assessment.

It is not easy to see how these damages can now be regarded as coming under the heading of compensatory damages at all, and why they should not be classified as exemplary. In *Ellis* v. *Raine*[77] the jury, misunderstanding the judge's direction, assessed the damages under the Fatal Accidents Act at £125 and those for loss of expectation of life at nil, and, on the ground that some damages must always be assessed under the latter heading, the Court of Appeal ordered a new trial. This was before the decision in *Benham* v. *Gambling*. After this

[72] [1941] 2 All E.R. 516.

[73] See Lord Atkin's speech.

[74] Demanded by Goddard, L.J., in *Gambling* v. *Benham* and by Scott, L.J., in *Ellis* v. *Raine*.

[75] See Du Parcq, L.J., in *Mills* v. *Stanway*.

[76] See MacKinnon, L.J., in *Ellis* v. *Raine*, at p. 108. For the narrow limits within which the Court of Appeal is prepared to interfere with the discretion of judges and juries in these cases see James, L.J., in *Phillips* v. *L.S.W. Rly. Co.* (1879), 5 Q.B.D. at p. 86. Scott, L.J., in *Bailey* v. *Howard*, Slesser, L.J., in *Mills* v. *Stanway*, Greer, L.J., in *Roach* v. *Yates*.

[77] [1939] 1 All E.R. 104.

decision one may wonder whether it is not open to a jury or judge of fact to assess these damages at a farthing in an undeserving case.

Any possible doubts as to the inapplicability of the rule in *Baker* v. *Bolton*[78] have been wiped away. The cause of action is not, of course, premature death, but the injury which deprives the victim of his prospect of happiness.[79] It is vested in him before his death, for a span of time which, in the case of instantaneous death, may not amount to more than a "split second."[80] This is the theory of the law, but in practice the doctrine of expectation of happiness and the application of the survival clause of the Law Reform (Miscellaneous Provisions) Act, 1934, to this claim means that the estate of a person killed in an accident benefits by his death. The abolition of the rule *actio personalis moritur cum persona* was justified, insofar as the *actio* referred to that which a deceased person transmits to his successors, but not further. After all, the representation of the deceased by his executor or administrator is only a fiction, just as much as the continental "*le mort saisit le vif.*" The law of succession is ancillary to the law of property. Succession to happiness is as unthinkable as succession to pain and suffering. In extending the survival of causes of action to claims other than those referring to property the law has fallen from one extreme into the other. The principle *actio personalis* should have remained in force with regard to all claims other than those of a strictly compensatory nature. It is true that the Act excludes the survival of claims for exemplary damages, but it should have gone further and also excluded any right of succession to claims for pain and suffering. Indeed, now that under *Benham* v. *Gambling* the claim for damages for loss of expectation has acquired most of the characteristics of a claim for exemplary damages, it would be arguable that it was caught by the exemption in the Act, if it was not for the binding precedent of *Rose* v. *Ford*. The prevailing canons of interpretation of statutes prevented the Courts from applying the exceptions in the Act in their spirit and by way of analogy. If they had done so, they might have come to the conclusion that not only the claim for damages for loss of expectation, but even that for pain and suffering should not be transmitted to the estate. "Stripped of all its technicalities, one is giving a *solatium*, not to the person who is injured, for the person who is injured is dead, but nominally

[78] (1808), 1 Camp. 493.

[79] In *Rose* v. *Ford* the Court of Appeal held that the rule in *Baker* v. *Bolton* applied. It was reversed by the House of Lords on this point.

[80] Lord Atkin in *Rose* v. *Ford*, and, for the theory of the "split second" Lewis, J., in *Morgan* v. *Scoulding*, [1938] 1 K.B. 786, a case of instantaneous death.

to the executor or administrator who is suing. . . . One is in effect, though, I agree, not in theory, merely giving a *solatium* to the parent for the loss of the child,"[81] or perhaps, to the creditors of the victim. But, in the theory of the law "the cause of action survives completely unaltered,"[82] and the amount of the damages must not be affected by the death of the victim. The Courts got entrapped in the metaphor "survival of action."[83] No action for damages should survive unless that is capable of surviving for the loss of which the damages are given. If this was the law, our problem would lose much of its importance. As it is, the death of the victim involves in fact, though not in theory, what it should not involve, a "gain to the estate."[84]

It is said that the *raison d'être* of the survival of actions is that it should not be more expensive to maim a man than to kill him.[85] The wrongdoer should not benefit from the death of the person wronged. This, however, cannot be the real *ratio legis*, for in all those cases in which this essentially non-compensatory and "punitive" line of reasoning would be most appropriate, i.e. in the case of exemplary damages, the survival of the action is excluded by the Act, and the wrongdoer benefits by the death. Besides, it is quite clear that the estate cannot claim for loss of earning power of the deceased, or for profits he would have been able to make, if he had not been injured. Yet, if he had lived he could have claimed for the loss of earning power of future profits which he would have suffered as a consequence of his accident, and for expenses of future treatment as well.[86] So it does, after all, pay to kill a man rather than to maim him. It is submitted that this principle which is applied to the loss of earning capacity would have been applied with far more justice to the loss of expectation of happiness.

It is true that, as soon as the victim is dead, the place of his own claim for loss of earning power is taken by the claim of his dependants under the Fatal Accidents Acts, but he may not leave any dependants, and, if he does, these claims are far more limited in scope than his own claims would have been. Above all they are subject to the rule that any benefit which the dependants

[81] Per Goddard, L.J., in *Gambling* v. *Benham*, and in *Mills* v. *Stanway*.
[82] Scott, L.J., in *Bailey* v. *Howard*.
[83] In *Rose* v. *Ford*, Lord Wright said: "The administrator simply stands in the shoes of the deceased and, in a sense, may be said to continue her life."
[84] Greer, L.J., in *Shepherd* v. *Hunter*.
[85] See Lord Wright in *Rose* v. *Ford*, and Greer, L.J., in *Rose* v. *Ford*, [1936] 1 K.B. 90 at p. 98.
[86] If the plaintiff in *Roach* v. *Yates* had died before the trial of the action, the damages would have been considerably smaller. See the judgment of Greer, L.J.

derive from his death—statutory exceptions apart—are to be set off against the claims.[87]

This latter rule, however, has served as a corrective for some of the incongruities worked by the decision in *Rose* v. *Ford*. If the beneficiaries who ultimately reap the profit of the expectation claim are identical with the dependants entitled to claim under the Fatal Accidents Acts, the sum awarded for loss of expectation must be deducted from the compensation payable to the dependants for the loss of the breadwinner. This question had been left open by *Rose* v. *Ford*, but it has now been settled by the Court of Appeal (Luxmoore, MacKinnon, Du Parcq, L.JJ.) in *Yelland* v. *Powell Duffryn Associated Collieries, Ltd.*[88] It would have been hardly logical to deduct the Fatal Accidents Acts damages from those awarded for expectation of life, as was suggested once or twice in previous cases.[89] From the point of view of the incidence of death duties the method now adopted by the Courts does not do any harm to the dependants, since it is the practice to deduct from the Fatal Accidents Acts compensation not the full damages awarded for pain and suffering and loss of happiness, but only the net amount after deduction of death duties.[90] For those cases, then, in which the beneficiaries are at the same time dependants entitled to claim under the Fatal Accidents Acts—and they are probably the majority of all cases—*Yelland's* case has given the *coup de grâce* to our problem. This decision marks the fall of the last curtain over the scene of this judicial drama—and little will probably be heard of it in the future.[91]

Yet—one final word remains to be said. The incongruities to which we have referred are not confined to cases in which the victim has died before the trial. *Flint* v. *Lovell* shows that they extend to "living" cases as well. In that case the Court proceeded on the assumption that the plaintiff would die within a year. He

[87] If a dependant who has a claim under the Acts dies before action, this will be taken into account by the Courts. This is difficult to reconcile with the 1934 Act, but nevertheless eminently just: see *Williamson* v. *Thornycroft*, [1940] 1 K.B. 658.

[88] [1941] 1 K.B. 154. The same view had been taken by Lord Atkin in *Rose* v. *Ford*, by Hawke, J., in *Dransfield* v. *British Insulated Cables, Ltd.*, by Singleton, J., in *Feay* v. *Barnwell*, by MacKinnon and Du Parcq, L.JJ., in *Ellis* v. *Raine*, and by Oliver, J., in *Hall* v. *Wilson*.

[89] Suggested by Lord Wright in *Rose* v. *Ford*, and see Branson, J., in *May* v. *Sir Robert McAlpine*, [1938] 3 All E.R. 85, and Langton, J., in *The Aizkarai Mendi*.

[90] In *Feay* v. *Barnwell*, Singleton, J., acted on this principle with which, however, Oliver, J., in *Hall* v. *Wilson*, did not seem to agree.

[91] If the damages under the Fatal Accidents Acts are assessed or settled and afterwards a claim is brought for loss of expectation, a difficult situation arises. See *May* v. *MacAlpine* and *The Aizkarai Mendi*. The later cases, such as *Ellis* v. *Raine* and *Yelland's* case give no guidance. It would seem that there would have to be duplication of damages and that there is no justification for the course adopted by Branson, J., in *May's* case.

did, however, survive for many years afterwards.[92] There is this curious phenomenon that the Court must, once and for all, award compensation to the victim of an accident for all the damage which he may suffer from it in future. It is submitted that the rule in *Fitter* v. *Veal*[93] and *Brunsden* v. *Humphreys*[94] should be repealed. It should be possible to deal with claims for personal injuries in the same way as with family maintenance claims, i.e. by way of judgments for annuities, variable according to the changing conditions which may arise as a consequence of the wrongful act. This would put the law of personal injuries on a more rational footing and relieve judges and juries of the invidious task of predicting the future.

O. KAHN-FREUND.

[92] He was still alive on December 8, 1937, when Lewis, J., decided *Morgan* v. *Scoulding*.
[93] (1701), 12 Mod. 542.
[94] (1884), 14 Q.B.D. 141.

PROFESSOR SIDNEY POST SIMPSON

WE take this opportunity of welcoming Professor Simpson to the Editorial Board of the *Modern Law Review* in the place of the late Sir Maurice Sheldon Amos.

Concerning the Harvard Law School of which he is a distinguished member it may be said that through it the English-speaking world has made its main modern contributions to the science of Jurisprudence, and that no more important work has been done towards the clarification and systematisation of the common law than that initiated at Harvard by such jurists as Story and afterwards substantially carried forward by the members of the Law School.

Professor Simpson's work is well known—we were fortunate enough to publish a characteristic example of it recently. His broad outlook upon and his critical yet constructive approach to modern society and its legal problems is exactly in the spirit which animated us in starting the *Modern Law Review*.

While we should welcome Professor Simpson upon our board at any time we feel that at the present critical period in the affairs of our two nations his membership is a symbol of that closer unity which alone can ensure the survival of our western democratic civilisation.

LEGAL THEORY AND THE PRACTICAL LAWYER

IT is still a common practice among lawyers to look upon legal theory as a useless speculation of theorists, irrelevant to the administration of law. Many are the contemptuous utterances of practical lawyers on legal theory as "metaphysical" speculation, but none perhaps is more sweeping than Lord Sumner's dictum in *Baylis* v. *Bishop of London*.[1]

"Whatever may have been the case a hundred and forty-six years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled justice as between man and man."

The vague jurisprudence which Lord Sumner had in mind was Lord Mansfield's attitude towards the function of equity and natural justice, as giving the basis of a principle of unjust enrichment. Lord Sumner's own attitude was, of course, itself the profession of a particular juristic faith, and it shared the fate of all legal and political theory, namely, to be followed by a reaction and an opposite legal theory. At present, only a few decades later, the "vague jurisprudence" which Lord Sumner condemned finds increasing recognition by English courts, which slowly accept a principle of unjust enrichment, based on general equitable principles.[2] Self deception, which comes out in Lord Sumner's doctrine, is characteristic of the positivist and analytical mentality which dominated his generation of lawyers, not only in England, but in all countries. Secure under the power of the state, which maintained in principle separation of powers and allowed an independent legal profession to develop, legal positivists could delude themselves that they were not concerned with legal theory. In reality they were legal philosophers, like everyone who has to solve legal problems, but their philosophy was inarticulate. They were, on the whole, unconscious of the non-legal values and ideals involved.[3] On the whole it can hardly be denied that those

[1] [1913] 1 Ch. 127.

[2] *Cf.* Lord Wright, vi Camb. L.J., 305 ff. Winfield, *Province of the Law of Tort*. Friedmann, 16 Can. Bar Rev. 243, 365. With some reservations, Holdsworth, 55 L.Q.R.

[3] Those non-legal values belong to religion, ethics, politics, economics, psychology, etc. In a wider sense one can call them political in so far as they are all concerned with the principles governing the life of the political organism. The notion "political" has, of course, itself shifted with underlying social conditions. The former division between political and economic life, for example, which has shaped many of the rules of international law, has been completely altered by the growing inclusion of economic matters in the activity of government. What was unpolitical fifty years ago, is eminently political to-day. For this reason, I prefer to use the term "political" in the comprehensive sense.

lawyers who are unconscious of their legal theory, are apt to do more harm than their more conscious colleagues. For their self-delusion makes it psychologically easier for them to mould the law in accordance with their beliefs and even prejudices without feeling the weight of responsibility that burdens lawyers with greater consciousness of the issues at stake.

The contrast may be illustrated by two judicial pronouncements. Lord Finlay observed in the case of *Crown Milling Co.* v. *The King*[4]: "It is not for any tribunal to adjudicate between conflicting theories of political economy."

Armed with this pronouncement, the learned Lord proceeded to give a judgment regarding the validity of a New Zealand Marketing statute which obviously upheld principles of liberal economy against state supervision.[5] Practically all English decisions, which are concerned with matters of economic competition, e.g. in conspiracy or in restraint of trade, display a similar outlook. Economic doctrines of far-reaching consequence, such as principles according to which price or market control or monopoly of production may be upheld, have been developed in a rather haphazard manner without much consciousness of the economic and social problems at stake and with corresponding absence of any scientific inquiry into such economic problems as that of a fair and reasonable price.[6]

This contrasts strongly with the following judicial pronouncement by Mr. Justice Holmes[7]—

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinion in law. It is settled by various decisions of this court that state constitution and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers,

[4] [1927] A.C., p. 394.

[5] For a similar judicial attitude, *cf.* the *Salt case* (1914), A.C. 461.

[6] For prominent examples of this attitude, *cf.* the *Mogul case* (1892), A.C. 25, the *Adelaide Steamship case* (1913), A.C. 781, the *Salt case* (1914), A.C. 461.

[7] 198 U.S., 75–76 (1905).

is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez-faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

The former of these judicial utterances expresses the opinion that the lawyer can solve legal issues which involve economic and social problems by a process of purely legal reasoning. The latter utterance reveals a deep appreciation of the interdependence between judicial and social and economic ideology. Mr. Justice Holmes himself chooses a solution characteristic of a judge in a non-totalitarian country, who is aware of a social responsibility, conscious of the political problem before him in the form of a legal dispute, but convinced of his duty of impartiality in the balancing of social forces and equally convinced of the duty of the judge to leave the shaping of the political principles of society essentially to the legislative.

A more precise analysis is, however, necessary and possible of the ways in which the practical lawyer may come into contact with legal theory.

In the first place, the "practical lawyer" comprises everyone concerned with the administration of law. Although the judge figures prominently, the legal adviser, whether in industry or before the court, and the administrator, are practical lawyers in this sense. If it was ever possible to maintain a clear-cut distinction between law and administration,[8] such distinction has become more and more difficult to maintain as the modern delegation of judicial or quasi-judicial power to administrative organs mingles administrative and judicial capacities. There remains a difference in degree, as to the extent of discretion in the administration of legal principles, but not a difference in kind.

Analytical positivism alone asserted in the work of Austin, Salmond, Gray, Pollock, Bergbohm, and others, that a clear distinction between the *is* and the *ought* created a correspondingly great division between legislator and lawyer. This theory,

[8] A supposition effectively demolished by Kelsen's theory.

acceptable if it is understood as supplying a working basis for the bulk of legal routine work, is illusory and dangerous if understood as a complete legal philosophy for the practical lawyer. Such an illusion, entertained by most, if not by all, representatives of this movement, has been exposed from very different quarters. On one hand the "Stufentheorie" of the Vienna School has shown by an analysis of the formal relation of legal norms that the difference between creation and application of the law is as relative as that between judge and administrator. From a very different angle, the sociological theories of Gény, Pound, Duguit, Kantorowicz, Heck and others have shown the extent to which social issues and ideals enter of necessity into the administration of the law. The American realist movement which originally chiefly revolted against both analytical positivism and metaphysical ideals has come more recently to an ever-increasing recognition of the importance of the ideal element in the administration of law,[9] while it has always insisted that the administration of the law is in fact concerned with issues other than pure legal logic. As for totalitarian theories of justice, they naturally give political and social ideals a paramount place in the administration of justice.

On the other hand, it is obviously necessary to assess as precisely as possible the limits within which a practical lawyer can move in his search for justice. In every modern political society, including the totalitarian ones, the distinction between the making and the administration of law is clear cut in a numerical majority of cases and situations. In thousands of cases, the application of a particular clause of a statute or of a precedent is a matter which causes no difficulty and no juristic problem. It is in the borderline situations, numerically small, but qualitatively all important, that the extra legal factors become paramount.

Two factors above all have in our own time increased the share of the practical lawyer in the moulding of the law. The first is the increasing complexity of social conditions which perpetually outruns the ever-increasing use and speed of the legislative machine. If statutory regulation decrees are made daily to regulate taxation, housing conditions, workmen's compensation, liability for aircraft accidents, the legal situations and problems arising out of these matters are always more manifold than the lawgiver's regulation can possibly foresee. Modern qualifications have given up the hopeless attempts made, for example, by the Prussian *Allgemeine Landrecht* to regulate every conceivable situation in advance.

[9] *Cf.* particularly Llewellyn, 40 Col.L.R. 587.

Given this fundamental fact applicable to all modern societies, the share of the lawyer in the evolution of the law is determined by legislative technique on one hand, and by political principles guiding the legislator on the other hand.

Technically the freedom of movement and choice between conflicting ideas for the lawyer is the greater, the more widely framed the legislative document which he has to interpret. The American constitution is the most prominent example of a widely framed legislative document. Setting forth certain fundamental principles of social life, it is linked with the judicial process by the function allotted to the Supreme Court as the guardian of the constitution against legislative or executive infringement. Never have lawyers been able to apply certain ideals to the exclusion of others more openly and with more consequence. So much so that some theorists see in the Supreme Court of the United States the actual sovereign.

In the interpretation of the fifth and fourteenth amendments in particular, economic doctrines have been applied under judicial cover. The role of the state in economic life, the rights and duties attached to property, the issues of collectivism and individualism and many other fundamental matters are among those in which the American Supreme Court has decisively influenced American political life for many decades. This influence is in the nature of things essentially a restrictive one. The Court has power to assert or suppress certain political and social ideals by restraining, approving or invalidating legislative or administrative acts, it never has to assume itself the responsibility of ordering a social problem in the way in which the legislator or the administrator has to do it.[10]

Not until the dissenting opinions of Justice Holmes began to develop the outline of the limits to be imposed upon judicial interference with legislation was the issue clearly defined. The problem, however, remains unsolved though the consciousness of the ideal element in the exercise of the judicial function of the Court became greater with the development of the struggle between conflicting ideas of justice. Justice Holmes and those who essentially followed the line taken by him, mainly Justices Brandeis, Stone, Cardozo, and Frankfurter, held that in a democratic state the judge had to leave the principles of social life to regulation by the competent legislative organs and should refrain from using his constitutional function to impose his own views against those which the legislative organs express as the proper representatives

[10] The most direct expression of economic doctrine is probably contained in the Advisory Opinion of 1871.

of public opinion. This went together with a conviction that the fundamental principles of the constitution had to be interpreted in a dynamic and evolutionary way; the legislative organs —unless they went against the plain words of the constitution— must be trusted to represent and express the proper evolution of the principle laid down in the constitution. This minority thus refused to consider social legislation, trade unions, etc., as contrary to the constitution. The majority opposed these views successfully until after the New Deal decisions, when new appointments made of the former minority a majority. No matter what attitude a judge takes towards the interpretation of the constitution, it cannot possibly be devoid of ideology, of certain conceptions about fundamental principles of life. Even the consciously judicious attitude of such men as Justices Holmes and Cardozo is characteristic of an attitude of tolerance which usually does, and in the case of these eminent judges did, go together with sympathy for the underdog.

In no other country has a court of law been given as powerful a political function as the Supreme Court of the United States. But in every country judicial ideals of social and political life have considerably influenced their legal activitiy. The German republican constitution of 1919, for example, enumerated a number of fundamental rights, most of which were, however, of a declamatory character. No judicial guardian was appointed. Nevertheless the German Supreme Court interpreted some of these principles, like those on the protection of private property or the equality of all citizens before the law, as binding superior law, and, at the same time, attributed to itself the right to invalidate parliamentary legislation, incompatible with these principles. It would be difficult to deny that the judges, the great majority of whom were anti-republican in their sympathies, were guided by their political ideals in the interpretation both of the fundamental rights of the constitution and of the judicial function in regard to legislation.

In countries without a written constitution, the connection of political ideals with the legal function is usually less obvious. But the difference is one of degree only; the interpretation of a housing statute, of provisions invalidating contracts against morality or public policy, even such questions as remoteness of damage or reasonable foresight, are matters ultimately related to fundamental policy. The extent to which ideals and thus legal theory influence the work of the lawyer, varies, however, according to the nature of the subject.

In a multitude of legal matters of a predominantly technical

character, such as most questions of commerce and conveyancing, purely legal aspects predominate usually. In other matters, such as the validity of contracts, family law, the law of delict and, of course, in matters of public law, such as criminal and constitutional law, the ideal element increases in proportion to the connection between the subject-matter and principles of political and social life. It would thus be possible—and some attempts in this direction have been made[11]—to establish a scale of legal relations according to the share of legal idealism. Parallel considerations operate in international law. The various parts of international law are affected by the disintegration of common standards and ideals according to the respective share of technical and ideal elements. An international postal convention can exist despite the most blatant divergences of political systems, but treatises of extradition, or arbitration or of cultural co-operation cannot.

Codes have faced the problem of judicial idealism in different ways. The Code Civil was framed in so general a way that successive generations of judges could interpret it in accordance with changing social conditions and ideals. The development of the doctrine of unfair competition, of abuse of right, of *le risque crée*, are prominent examples of the way in which the practical lawyer projects ideals into the administration of the law.

At the other end, the Swiss Civil Code of 1907, after a century of codifications, openly acknowledged the impossibility of legal self-sufficiency by instructing the judge to assume the function of an imaginary legislator when faced with a gap in the statute. Half-way between these are codes such as the German Civil Code of 1900, which without seeing the judicial function in the same light, contained some general clauses about good faith and morality which made it possible for courts to infuse specific ideals into the interpretation of its clauses. Thus the German Supreme Court developed from the simple clause that obligations are to be interpreted in accordance with good faith, a theory of revaluation of debts discharged in marks during the inflation, despite the obvious acceptance of nominalism by the code. Stammler's pathetic attempts to solve problems of the Civil Code by maxims alleged by him to be of a formal character, demonstrate clearly the impossibility of any interpretation of doubtful cases without some political valuation. The pendulum has swung to the other extreme with National Socialist jurisprudence, which creates a definite supremacy of political principles over all established logical and technical principles of legal interpretation.

[11] *Cf.* O'Sullivan, Modern Law Rev., Vol. 1, p. 25, ssq.; Friedmann, Modern Law Rev., Vol. 2, p. 194.

Under the reign of the Common Law, the position is only superficially different. Legal idealism operates in many ways. The most important instrument of modelling the law in accordance with certain ideals is probably the notion of Public Policy. How far a man might validly sell his liberty to work,[12] how far trade competition may legitimately be extended,[13] at what point the law steps in to limit collective action in conflicts between employers and employees,[14] these and many other questions have been decided by English and American law courts in accordance with certain principles of policy, although under the guise of purely technical terms, such as restraint of trade, malice, conspiracy.

No less interesting, if less obvious, is legal idealism working in the development of precedent. The House of Lords in recent years has demonstrated how precedent can be moulded so as to give expression to new social tendencies.

Such decisions as *Wilsons & Co.* v. *English*,[15] *Radcliffe* v. *Ribble*,[16] *Caswell* v. *Powell Duffryn*,[17] strengthen the social responsibilities of the employer. The decisions on libel from *Hulton* v. *Jones*[18] to *Newstead* v. *London Express*,[19] foster a tendency to discourage the publication of the more gossipy type of news by the popular Press by imposing a strict standard of liability. Decisions like *Haynes* v. *Harwood*,[20] and *Hollywood Silver Fox Farm* v. *Emmett*[21] give expression to an attitude of greater helpfulness towards one's neighbour as againstthe rugged individualism of the former Common Law. A broad development of the torts of negligence, nuisance, and the rule in *Rylands* v. *Fletcher*, show a definite movement from the principle of individual fault towards strict liability as a corollary of social control. In all these developments changing social ideals operate through judicial activity. In American and particularly English law, these ideals tend to be submerged under technical arguments. But the apparently rigid obligation to follow precedent leaves many ways open to judicial ingenuity. It has, however, the one result that lawmaking under the Common Law is essentially inarticulate. Whether one prefers, as many English jurists do, this inarticulate method

[12] *Cf.* the leading cases on restraint of trade, from *Morris* v. *Saxelby* (1916), A.C. 688 onwards.
[13] *Mogul Steamship Co.* v. *McGregor* (1892), A.C. 25.
[14] Conspiracy cases, *cf.* in particular the judgment of Evatt, J., in the Australian case of *McKernan* v. *Fraser*, 46 C.L.R. 343.
[15] (1938), A.C. 57.
[16] 55 T.L.R.
[17] (1939), A.C. 215.
[18] (1910), A.C. 20.
[19] (1940), 1 K.B. 377.
[20] (1935), 1. K.B. 146.
[21] (1936), 2 K.B. 468.

as being better fitted to the continuity of legal tradition or the open acknowledgment of judicial idealism in the law as leading to a clearer understanding of the respective function of legislator and lawyer, of *is* and *ought*, is a matter of choice.

Whatever the choice may be, all those who think that the lawyer should know as far as possible what he is doing, must assess as best as they can the scope and function of legal idealism in the administration of law. Those who unconditionally obey political guidance as totalitarian lawyers do, or who, in despair of a rational solution, follow mere instinct and intuition, like the adherents of the *Freirechtslehre* and some followers of the realist movement, may avoid the difficulties of having to find solutions for themselves. But they are, of course, no less subject to the facts just outlined.

The choice largely depends on the political society in which the lawyer works. All the theories which, whether of continental or of Anglo-American origin, have established principles by which the judge should be guided whenever his decision is not clearly indicated by statute, precedent or any other binding authority, presuppose, and can operate solely in a society which does not simply identify the administration of law with political government by making it a department of the latter. Such a society is non-committal and tolerant towards the various social forces at work in the state. In Great Britain and in the United States as they were constituted before the outbreak of the second world war, civil servants, local governments, official judges, chairmen of administrative tribunals, struggled to reconcile conflicting claims and interests of employers and employees, of industry and agriculture, of industrial monopoly and the consumer, of private property and public duty, and so forth. It is no accident that Dean Pound is non-committal about the ranking of the six paramount legal interests which he detects in the law,[22] except for the remark that "perhaps" the social interest in individual life is the most important. Any ranking between the chief legal interests must bear the stamp of a definite political order. Equivalence of all these interests would be recognised by some, but by no means all, societies. All those jurists who have developed theories of a conscious assessment and balancing of social interests as a vital part of legal work, have lived and worked in societies in which those interests were all recognised, but the state in the name of the community refrained from ordering them in a deliberate manner. Far removed from this position are, at opposite ends,

[22] *Cf.* his *A Theory of Social Interests in Proceedings of American Sociological Society*; also in *Spirit of the Common Law.*

both the positivist and the totalitarian lawyer. The former's ideology is unconscious, he lives behind the artificial wall of a completely logical legal order; the latter's ideology is so completely prescribed for him by his political superior that he feels safe in obedience. Both types of lawyer are essentially craftsmen. The tools of the former, consisting of such equipment as the classification of legal concepts, the rules regarding the application of precedents or the interpretation of statutes, which form the chief equipment of the analytical lawyer, are supplemented and to a large extent replaced for totalitarian lawyers by party programmes, administrative instructions and political commands. Between these two extremes, those lawyers who work in societies of a different structure, may be unconscious of the responsibility of choice, but they cannot evade it. Theirs is a nobler, but also a more difficult, task. It links up with one of the paramount issues of the present international struggle: the responsibility of the individual. Is he to be nothing but a living tool with a certain function, a highly developed animal, an obedient worker in a state directed by a master will, or is he to have a share of the responsibility in the making and development of society? The function of the lawyer forms only one, but not an unimportant, part of this issue.

W. Friedmann.

SOME ASPECTS OF WORKMEN'S COMPENSATION[1]

Among the many minor evils which have resulted from the second World War, not the least important is the postponement of the long overdue reform in the system of workmen's compensation. The sittings and report of the Royal Commission appointed to examine the whole subject have been suspended, and as an interim measure the Act of 1940 was passed. This increases the basic amounts paid weekly to disabled workers, and extends the payment of children's allowances, but makes no attempt to bring about any changes in the system of compensation.

This delay is perhaps the more unfortunate, in that the war has inevitably resulted in a vast development of mechanised industry with its attendant dangers, and in a great increase in the number of new workers (particularly women) who are unaccustomed to machines and are thus more likely to fall a victim to accidents. The defects and inadequacies in the present system of workmen's compensation are thus likely to be even more apparent than in normal times.

The unsatisfactory nature of the present provision for compensation has been stressed in many books on the subject—most recently and exhaustively in Sir Arnold Wilson and Professor Hermann Levy's first volume on the social and political development of workmen's compensation—and in evidence before several Royal Commissions. The defence of common employment, which in so many cases bars an action for damages; the lack of any provision for compulsory insurance by an employer; the unequal legal positions of worker and employer, or more usually employer's insurance company—in arbitration cases; the inadequate amounts paid in compensation; the hardships arising from partial disability; all these and many other imperfections have been described repeatedly.

The present discussion is concerned with a few of these points, but also with another—namely the widespread ignorance among many workers of the provisions and even the existence of the Workmen's Compensation Acts. As a result of this ignorance a considerable number of accidents—particularly to women—causing much suffering, both physical and economic, and possibly permanent disability, are never compensated at all.

My own practical experience in this matter is chiefly, though not entirely, limited to women and girls. Owing to the war an increasing number of women are entering industry for the first time, and are also being absorbed into other forms of work in which they have not previously been employed, and the number and proportion of accidents among women and girls is likely to increase. Where workers belong to a trade union, their interests are usually protected by the union in the event of their being victims of an accident. But, according to Wilson and Levy, only about one worker in three does belong to a trade union, and the proportion is considerably smaller among women than among men. In this war, as in the last, the number of women trade unionists in the large well-organised industries is likely greatly to increase, but a great many women and girls are working and will be working in smaller establishments which are not Government controlled and where trade unionism is weak or non-existent.

[1] The following article is by a social scientist with experience of welfare work. We publish it here as we think that lawyers should be aware of the experience of workers in other fields in respect of the subject-matter of their own activities.

Again, accidents are not confined to factories and mines, though of course the great majority do occur there; but an accident to a shop assistant or a hotel worker is as painful and disabling for the worker as if he—or more likely she—were a factory hand, and his or her interests are much less likely to be watched than those of a factory worker.

It is among such unorganised workers that lack of knowledge of the Act is most prevalent and most serious. Very often they do not know even that a Workmen's Compensation Act exists at all, much less how to make a claim. A case that came to my notice a few years ago may illustrate this. A young girl came from one of the "Special Areas," where she had been unable to find employment, and took a job as chambermaid in a small hotel—one of a group belonging to one man. Shortly after she took up the work she fell downstairs and was badly hurt. She was sent to the infirmary and no further interest was taken in her by the manageress who engaged and dismissed the staff. The proprietor did not live in the hotel where the girl worked and was not told of the accident. By chance a visitor to the hospital came across the girl, heard the story, and helped her to write, giving notice of the accident and making a claim. It turned out that the employer was duly insured against accidents and compensation was paid with reasonable promptitude. But such cases ought not to be left to chance benevolence. The onus of giving notice of accident and making a claim ought not, as at present, to rest entirely upon the worker. Even in factories where the Factories Act requires that an Accident Book be kept (entry in which constitutes notice of accident) it is still necessary for the injured person to make a claim before compensation is paid, and I have on several occasions been told by welfare workers or industrial nurses in large factories of cases where the injured worker has been entirely ignorant of the necessity of making a claim for compensation. In at least two instances the welfare worker has also informed me that she was told that it was no part of her duty to advise the injured worker of his or her rights or as to the requirements of the Act. In small establishments and non-industrial employment, as in the case of the girl described above, there is not even the safeguard of an accident book, and ignorance of the correct procedure is widespread. It is obviously impossible to ascertain how many accidents go uncompensated because the victims do not know how to obtain compensation, but I think the number, while of course only a small proportion of the total number of industrial accidents, is large.

When a claim is disputed by the employer or more often by the insurance company with which he is insured, the disadvantageous position of the worker is well known. The insurance company is in a position to brief the most able counsel, and in the event of an adverse decision in the lower court to carry the case to the Court of Appeal or even to the House of Lords. Where the worker is a member of a trade union it is true that his union will usually look after his interests and supply effective legal aid. But the funds of most trade unions are not unlimited and they may well hesitate to incur the heavy costs of an appeal in any case where there is an element of doubt. Even with the help of his union the injured worker, faced with cross-examination by an able opposing counsel whose object must be to defeat his claim, is likely to become confused and distressed and thus not show to the best advantage. The ordinary Court of Justice is not in my view suitable for the discussion and settlement of workmen's compensation cases—at any rate so long as economic equality is in effect a condition of equality before the law.

But it seems certain that a good many perfectly legitimate claims are never taken to arbitration at all, because the insurance companies reject them, and the workers, because they do not know how to obtain legal assistance and are indeed ignorant of the whole legal position, acquiesce in the rejection. Two instances in my own experience will illustrate this —one was an elderly woman, the other a boy; neither was an industrial worker nor a trade unionist. Both were injured in the street, while they were engaged on their proper employment and during their working hours. In each case the employer thought compensation was payable but the insurance companies refused it on the grounds that the accidents were street accidents and not incidental to the employment. The woman and the boy's guardian accepted the rulings—with disappointment and indignation certainly, but without question. Here, again, this time remarkably enough as a result of a "Mother's Meeting," the cases came to light, and the claimants were referred to a lawyer, who renewed their claims. In each case, as soon as it was clear that the victims had a legal backing, the insurance companies paid up, and quite substantial compensation was forthcoming. If these people had been members of a trade union their claims would probably have been properly pressed in the first instance. But one was an errand boy and the other a shop cleaner—neither of them occupations where trade unionism is likely to be very strong.

The position of "lump sum agreements" is also, as has often been remarked, far from satisfactory. By the Act of 1906 an agreement as to the redemption of a weekly payment by a lump sum does not discharge an employer from his liability under the Act, unless the agreement has been registered in the County Court, and under Schedule II (9) (*d*) of the Act, the Registrar was given power to refuse registration if he considered that the agreement had been obtained by improper means, or was for an inadequate amount. In 1923 and 1924, the House of Lords (*Russell* v. *Rudd*) held that this provision applied to cases where a lump sum was agreed upon before any weekly payments had been made at all, and not only to cases where weekly payments had been begun and a lump sum was proposed by way of redemption. The practice of County Court Registrars varies as to how far they use their powers to refuse to record an unsatisfactory agreement. But the protection of the injured worker is not nearly as complete as it may sound. "Invalidity" is not the same thing as illegality, and many insurance companies are quite prepared to run the risk and carry through an agreement without its being recorded. The workers are frequently unaware of the provisions as to recording and will accept quite inadequate sums sometimes because they are afraid that if they do not they will get nothing. But also to the man or woman whose income has never exceeded a small or even a moderate weekly wage, a lump sum, even though it may be quite inadequate, sounds a great deal. One woman whom I knew was badly injured in an accident while working in a factory, and for some weeks drew 27s. 6d. a week in compensation. The insurance company then suggested to her that everyone would be saved trouble if she accepted a lump sum, and offered £5. The girl refused this, and the insurance company then handsomely doubled the offer; £10 sounded a very large sum to the girl, and she was on the point of accepting. Her panel doctor strongly opposed acceptance and she was put in touch with a lawyer who promised to take up her claim. As soon as the lawyer appeared on the scene, the insurance company said no more about £10, but continued without further question to pay weekly compensation

for six months. At the end of that time £15 was paid in redemption, and the agreement was duly recorded by the Registrar of the County Court.

Another case had a less satisfactory ending. Here an elderly woman was permanently disabled and her earning capacity considerably diminished by an accident. She was persuaded by the charms of the attractive young man whom the insurance company sent to call upon her to accept £20 in settlement of her claim, before any weekly payments had been made. She was alarmed at the prospect of legal proceedings and "having to appear in Court," and also the young man "had been so nice," and therefore although she was assured that the agreement, as it had not been recorded, was not binding on her, she refused to take any further steps. As an unrecorded agreement is merely invalid and not illegal, nothing more could be done.

Most of the defects in the Workmen's Compensation system here discussed have concerned the shortcomings of some commercial insurance companies, and it may seem an inconsistency to include as an additional defect the fact that there is no compulsion on employers to insure at all, except in the mining industry. Certainly compulsory insurance would not remedy the various injustices commented upon here—it might even increase them. But it is also true that the lack of such compulsory insurance against liability may mean that in certain cases, the worker, however severely he may be injured, will get no compensation at all. I have known this happen in several cases—all of them as might be expected where the employer had only a small business, and where the wages paid were low, so that the worker had little in the way of savings. In one instance the employer went bankrupt some time after compensation had begun to be paid, and no further payments were made to the injured worker, who was permanently disabled. In the other instances the victims of accident got nothing at all, because there was no money wherewith to pay them. Compulsory insurance, though not on the same lines as the present voluntary schemes, must surely form a part of any satisfactory compensation system.

This article has only dealt with a few of the many difficulties arising out of the present system; the vast volume of litigation arising out of the Act has hardly been mentioned—for most of the cases referred to did not come to arbitration at all. Lack of space prevents a discussion of the various interpretations of "accident," "arising out of and in the course of employment," and other contentious points in the Act, that help, as Sir Henry Slesser remarks, to provide a living for young barristers. Nor can any attempt be made to formulate a satisfactory scheme—even if I were bold enough to rush in so foolishly where angels fear to tread. All that can be attempted is to suggest tentatively how some of the defects outlined might be dealt with.

One of the chief difficulties here discussed is the ignorance of many of the workers as to the provisions of the Act—what they are entitled to and how they are to make a claim. This is of course most serious in the case of unorganised workers; where trade unionism is strong, the legal advisers of the unions can and do watch the interests of their members. A large increase in trade unionism membership, particularly among women, would certainly greatly mitigate the evils arising from ignorance. A considerable increase is likely to take place during and possibly after the war, but I do not think it is likely to be great enough or to extend far enough into the hitherto unorganised occupations, to be a complete safeguard. Such a

safeguard is only, I think, likely to be achieved by a considerable measure of State control, over the making and payment of claims. The same considerations apply in regard to lump sum agreements; where the claimant is in touch with a good trade union his interests are likely to be watched and an unsatisfactory settlement prevented; where funds permit, a claim may be pressed in Court and if necessary taken to the Court of Appeal and even the House of Lords. But here, again, trade unionism is not likely for a very long time to be strong enough to be a hundred per cent effective. A much increased amount of State control would, it might be hoped, obviate the necessity for so much litigation with the consequent expenditure of money which might be so much better spent on more adequate compensation and on schemes for the rehabilitation of the injured workers.

At the very least any reformed scheme ought to carry out the recommendation of the Holman Gregory Committee and provide for the appointment by the Government of a Workmens' Compensation Commissioner with wide powers. But it would seem to me desirable to link up the whole system with the other social services and place it to a great extent under State control. This would involve either the abolition of insurance with commercial insurance companies and through mutual associations and the substitution of a State scheme; or the retention of private insurance under statutory conditions, so that the companies would be in the position of the Approved Societies under the National Health Insurance scheme, though rather more effectively controlled. Besides such control of insurance, the plan for hearing claims which has been suggested by Mr. W. H. Thompson in a recent pamphlet might be instituted; that is, arbitration proceedings should no longer be conducted in the County Court, but in special tribunals constituted rather on the lines of the Courts of Referees under the Unemployment Insurance Acts, and without the present expensive legal machinery.

The linking up of compensation with the other social services would also facilitate what has long been desirable, namely to combine an adequate scheme of compensation for injuries with schemes for the prevention of accidents. This reform has already been put into practice by several countries, and could be carried out in conjunction with the Factory and Welfare Department, and through some form of "Merit rating"—that is, the raising or lowering of insurance premiums against liability in accordance with the accident rate of the particular firm.

The Royal Commission on Workmen's Compensation is still in being, and a Committee has been set up under the chairmanship of Sir William Beveridge which has the task of examining the working of the social services as a whole. Is it too much to hope that the two bodies may be in contact, and that the result will be a scheme which will, if carried into effect, incorporate workmen's compensation into a unified structure of social services, so that the dangers of modern industry, and the sufferings of their victims, if they cannot be entirely removed, may become more really the responsibility of the community?

R. C. CHAMBERS.

STATUTES

Allied Powers (Maritime Courts) Act, 1941

This interesting and indeed unique statute received less attention in its passage through Parliament than it deserved. It enables certain of the Allied Powers to set up in the United Kingdom Maritime Courts of criminal jurisdiction and is thus an infraction of a well-known principle of sovereignty which has been much prayed in aid by China, Turkey and other States in their successful attempts to put an end to the exercise of extra territorial rights by foreign sovereign powers within their boundaries. Extra territorial courts were established in the Levant as a matter of mercantile and religious convenience, and their existence was not at the time regarded as in any sense a mark of subservience. In later times however they were forced upon such countries as China by military operations, and their existence came to be regarded as a mark of inferiority. In this country in medieval times the position of the religious courts would have been regarded as anomalous according to modern conceptions of sovereignty, and furnished indeed a grievance, but more because of their rapacity than because of objections to their jurisdiction.

It may perhaps be regarded as a favourable sign that Parliament was not very much impressed by the argument against the measure on the grounds that it involved an infraction of British sovereignty.

With the flight to England of the Norwegian, Dutch and other governments from their own territories as a result of the German invasions they ceased to have any effective machinery of justice in respect of those of their nationals who came with them. This might not at first sight appear to be serious for when these people landed here they became subject to our laws and the jurisdiction of our courts. In two cases however the position was not in fact satisfactory.

In the first place the remnants of the Allied military, naval and air forces came here to continue the struggle. It soon became obvious that they must be provided with the ordinary disciplinary powers which exist in every military force, and be allowed to establish their military courts. This was done by the Allied Forces Act, 1940, which conferred rights and powers parallel with those conferred upon the Dominions by the Visiting Forces (British Commonwealth) Act, 1933. The Allied Forces Act was objected to in certain quarters on the grounds that the standards in some foreign courts martial might be less enlightened than those prevailing in our own, but this is a difficulty, which if it exists at all, can be more satisfactorily dealt with through diplomatic representation than statutory enactment.

In the second place, some of the Allied Governments retained under their power a substantial portion of their mercantile marine which has continued to play an important part in the struggle against the enemy. Except in so far as they might take place in territorial waters criminal offences committed on board these ships ceased with some few exceptions to be cognisable, for practical purposes, in any court. It was necessary in the first place therefore to enable the Allied Governments to set up courts in this country in which such offences could be tried, or else to arrogate to our own courts a jurisdiction to deal with them. Either course meant some infraction of sovereignty, in the classical conception, but the infraction involved in the latter was obviously more serious than that

in the former, and with a magnanimity suitable to the occasion the British Government chose to undergo a technical breach of its own sovereign rights rather than to inflict a real loss of sovereignty upon its Allies. The loss in our case would not be more than technical because all offences by British subjects are withdrawn from the jurisdiction of the Allied Maritime Courts, and a new jurisdiction is conferred upon British Courts to deal with offences committed upon Allied merchant ships by British subjects (Section 4). Section 2 (1) (*a*) accordingly confers jurisdiction on the Maritime Courts, when set up, to deal with offences committed by any person other than a British subject upon a merchant ship of the Power constituting the court.

From a practical point of view however it was more important to provide the Allied Governments with the means of enforcing discipline among the crews of their ships. Contracts for service on board ship are in most countries treated exceptionally and stand half way between an ordinary contract of service between an employer and his workman, and a contract to serve in the armed forces. Thus in this country a seaman who disobeys orders, or is guilty of various other breaches of contract, can be brought before a magistrate and sentenced to imprisonment just as if he had committed a criminal offence. This position has been much criticised, but rightly or wrongly it is generally thought that these severe disciplinary powers are required in the case of seamen. Section 2 (1) (*b*) of the Act accordingly enables the Allied Governments to deal in this country with infractions of their merchant shipping laws by bringing them before their Maritime Courts.

Thirdly, Section 2 (1) (*c*) enables the Allied Governments to enforce in this country their mercantile conscription laws against seafaring men who are their own nationals. The British Government has power under the Defence Regulations (see Regulation 47a) to direct a man to serve on board a British ship, and it was deemed advisable that the Allied Governments, if they had or decided to take similar powers, should have the means of enforcing them.

The substance of the Act is therefore to be found in Section 2 (1), which confers this threefold jurisdiction upon Maritime Courts. In respect of offences under Section 2 (1) (*b*) and (*c*), the jurisdiction is not retrospective, while in the case of those falling under Section 2 (1) (*a*) there is a limitation period of six months before the passing of the Act. The question of retrospective jurisdiction caused a real clash of opinion in the House of Commons. There is a well-known and very proper hatred of the creation of criminal offences retrospectively, and the courts will find against such an intention in a statute unless the words are clear. It does not however appear that there is any such policy in the case of procedural statutes, and I have not been able to find authority on the point.

Among other interesting features of this statute the following should be noted, though lack of space prevents any detailed examination of these. In the first place an accused person can only be brought before a Maritime Court by a summons or warrant issued by a British Justice of the Peace, and witnesses will be got to court in the same way (sub-sections 5 and 6). Moreover by the rules issued by the Lord Chancellor under the Act arrests must be effected and documents served by British police officers.

Secondly, punishment will be in effect carried out by the British authorities. The Act only provides for two kinds of punishment, imprisonment and fine. Imprisonment must take place in British prisons, except that in the case of long-term sentences the prisoner may, with leave of the

Home Secretary, be removed to overseas territory of the Power whose national he is (Section 8). Capital punishment will accordingly be suspended in the case of murders committed on the high seas in allied ships, unless by British subjects.

Thirdly, in one of the most interesting sections of the Act (Section 9) provision is made for the setting up of special local tribunals for the purpose of determining claims to British nationality. The procedure in such courts is largely determined by the Schedule to the Act, together with the rules made thereunder, and this is well worthy of perusal for Sections 9 and 10 provide that the matter may be determined by affidavit evidence or even on documentary evidence only while in order to establish his claim an applicant has only "substantially" to satisfy the court.

Fourthly, while the decisions of the Maritime Courts are made by Section 11 (1) conclusive in respect of all questions within their jurisdiction, the British courts are given power to decide whether or not they do in fact overstep their jurisdiction. R. S. T. CHORLEY.

Postscript.—The Netherlands and Norwegian Governments have now constituted courts under the provisions of the Act.

The Liabilities (War-Time Adjustment) Act, 1941

The vague presence of discomfort which often besets academic lawyers put close to legislation, seems, judging by their reticence on the topic, heightened into near repulsion when that legislation is of the kind called "emergency." This is a great pity. Law sticks, whatever its label; but, more than this, there is jurisprudential ore of high value to be extracted from the mass of war-time law. The emergency statute offers excellent opportunities for the study of the techniques of law in action. The mischief to be remedied and the legal solutions adopted stand in striking juxtaposition. Results tend to be rapid and to affect the common man in his ordinary experience. For the lawyer, the creative tensions among fact, policy, and tradition (including the specialized and self-integrated form of existent law) and the channels through which those tensions pass in taking on legal shape, stand revealed more clearly than in laws of long historical accumulation. No such pretentious analysis can be attempted here, but it remains true that an Act of this kind can only be discussed profitably when it is regarded not merely as a legal document, but also as force applied towards an objective. Perhaps this explains the prevailing timidity.

Although, as will be shown, there is a certain nebulosity as to its precise intended objects, the circumstances underlying this Act are hard and notorious. The economics of war have undermined the livelihoods of thousands of small traders, shopkeepers, and professional men. There is no evidence that the drafting was based on any scientific collation of the facts, but an indication of the condition of a section of these people is to be obtained from a survey conducted in August, 1941, which established that 17 per cent of the retail shops in Glasgow[1] had put up shutters since the outbreak of war, and that this proportion would probably reach 25 per cent by the end of the year.[2] A perusal of some of the trade papers suggests that these figures are not local.[3] In its terms, the Act is not

[1] The Act applies only to persons ordinarily resident in England, or persons, firms or companies carrying on business in England; s. 24 (1).

[2] Charles Madge, *The Spectator*, 15th August, 1941.

[3] For example, *Tobacco* (1st August, 1941) records that 600 of 3,500 (17 per cent) retail food shops in Manchester have closed.

limited to any special class, and there is no legal reason which prevents millionaires in depressed circumstances or wage-earners from making use of it. However, the remedies prescribed contemplate afflictions chronic with the "small man" and latterly become acute. The potentialities for relief of the Courts (Emergency Powers) Acts, stop-gaps behind which obligations pile up for a final day of reckoning, have been far exceeded.[4] Bankruptcy, on the other hand, with its stigma and penalties, and its seeking after the last asset in favour of creditors, would be unjust to a debtor who is, in his way, as much a war victim as an air-raid casualty, and inexpedient for the state in ruining a whole class which has hitherto been a characteristic part of its social structure.

For these reasons, and for the reason also that in attempting to preserve the financial stability of large numbers of debtors the Act works to the long-term advantage of creditors, the procedure was designed to obtain non-litigous settlement, with resort to the court as an underlying sanction. S. 1 (1) provides[5] that any person who is in serious financial difficulties owing to war circumstances may apply to a Liabilities Adjustment Officer[6] for advice and assistance in enabling him to arrive at an equitable and reasonable *scheme of arrangement* with his creditors, and, in particular, a scheme that will enable him to preserve his business or recover it when circumstances permit. Where the debtor and all creditors with provable debts (which are defined in s. 17) to whom notice has been given assent to the scheme of arrangement, the L.A.O. must approve it; where the debtor and only a majority in number and value of such creditors assent, he may approve it, subject to certain provisos, one of which is that the court[7] would have had jurisdiction to make a liabilities adjustment order in the case. Under s. 3, a debtor who, owing to war circumstances, (i) is unable to pay his accrued debts, or will be unable, after such payment, to meet, as they fall due, any future liabilities in respect of obligations already incurred (i.e. an insolvent debtor), or (ii) if he were required to pay such debts and meet such liabilities, would have no reasonable prospect of preserving or recovering his business, or would otherwise lose his means of livelihood (i.e. a debtor who is solvent, but can remain so only by sacrificing his living), may apply to the court for *adjustment and settlement*

[4] A defect in these Acts proceeding from the argument, untenable in modern war, that a man enters post-war contracts with open eyes, has been removed by s. 26, which extends them to contracts made after the commencement of war, with the difference that where it is a case of the recovery of a debt, recovery of possession of land in default of rent, recovery of possession of land other than a dwelling-house by a mortgagee, in default of payment of money, or delivery of goods in default of payment of money, it is not for the plaintiff to obtain leave to execute the judgment, but for the defendant to make application to resist execution.

[5] In pursuance of the object of this note to give a general conspectus of the Act and to judge its merits, reference is made only to the more important sections, and their provisions are given summarily. It is hardly necessary to emphasise that for complete accuracy, regard must be had to the text itself.

[6] Nineteen officers for different districts have been appointed by the Lord Chancellor under s.2. The Solicitor-General said in the debate (*Hansard*, Vol. 371, col. 315): "Obviously we want someone who can divest himself of what I may term 'the old bankruptcy atmosphere'—we want a man who will adopt a new attitude towards a new problem." Research in the *Law List* reveals that at least eight of the nineteen are official receivers. Since the Act is in fact haunted with reincarnations from that atmosphere, these appointments have their perverse logic.

[7] Normally the County Court; see s. 20. There is an appeal from the County Court to the High Court under s. 111 of the County Courts Act, 1934.

of his affairs. Where the court considers that a *prima facie* case of either (i) or (ii) has been made out, it may make a protection order, which creates a standstill, while the court considers whether either of these sets of circumstances has been substantially established, and whether it is practicable and proper to deal with the case under the Act. Where it comes to an affirmative conclusion on both these questions, it must make a liabilities adjustment order adjusting and settling the debtor's affairs.

A weakness common to this type of procedure is that the first court decisions raise conditions of minimum acceptability, so that solicitors will tend to advise their clients to litigate rather than accept anything less by agreement before the L.A.O. But there are here more serious defects. S. 1 (3) enables a creditor who dissents from a scheme of arrangement to appeal to the court. S. 1 (6) enables the court to enforce a scheme of arrangement through the machinery of contempt. By s. 1 (7) the court may revoke a scheme of arrangement on such grounds as absence of good faith on the part of the debtor. These are necessary safeguards, and the court, aided by its power under s. 11 at any time to refer to the L.A.O. any question arising in the course of adjustment proceedings for his investigation and report thereon, will doubtless make short shrift of a filibustering creditor bringing an unreasonable appeal from a fair scheme of arrangement. Suppose, however, that while the L.A.O. is endeavouring to bring the parties to agreement, one creditor attempts by suit to seize the assets? The fundamental impotence of the L.A.O. is at once bared; he has no power to make a protection order, preserving the status quo, while negotiations proceed. The contingency was foreseen, since Rule 5[8] provides that where the L.A.O. considers the case proper for his intervention, but that it is necessary to preserve the debtor's assets that a protection order should be made, he shall advise the debtor to apply to the court for a protection order, and, ultimately, a liabilities adjustment order. But this torpedoes the attempt at non-litigous settlement; the procedure scuttles itself. It is true that s. 20 (3) provides that any court before which are pending any proceedings in respect of a debt or liability which would be provable in liabilities adjustment proceedings may stay the proceedings on the ground that the debtor's affairs are before the L.A.O. or to enable him to bring them before the L.A.O. This is permissive and its contingent exercise is not likely to deter the L.A.O. from committing *hara-kiri* by advising the debtor that he speedily needs a protection order.

S. 20 (3), moreover, only comes into the picture when the creditor has taken proceedings. Suppose A owns a boarding-house and brings her difficulties before the L.A.O. Among her debts is one for £*x* to the local authority for electricity supplied. Nothing in the Act prevents the authority from threatening that unless the debt is paid in full it will exercise its statutory power to cut off the supply; and it may even do this whilst proving in the adjustment proceedings before the L.A.O. He has no power in the matter, and s. 20 (3) cannot operate where the remedy is one that needs the intervention of no court. This example transcends its own immediate interest to become symptomatic of a serious defect in the Act. The pressure exercised by a threat to disconnect gas, electricity, water, telephonic communication, is well-nigh irresistible, since these

[8] The Liabilities (War-Time Adjustment) Rules, 1941 (S.R. & O. 942/L.17), made under s. 16.

services are normally indispensable for the conduct and preservation of a business, and in failing to foresee and provide for this, the Act falls short of its first declared objective.[9]

As a scheme of arrangement is reached by agreement, its permissible contents are defined largely in s. 1 (3) to include the composition of debts, postponement of their payment, the charging of property in favour of creditors, the management or disposal of the debtor's business or any other part of his property, and, with the consent of the other parties thereto, the variation of any lease, mortgage or contract to which the debtor is party. The permissible contents of a liabilities adjustment order, on the other hand, are elaborated and particularized. By s. 4 (1) the court shall provide, in such an order, for the payment of proved debts, either in full or to such an extent as it considers practicable, and may for that purpose provide for the realisation of the debtor's property. In settling the terms of the adjustment order, however, it may allow, to such extent and subject to such conditions as it thinks fit, (i) for the maintenance of the debtor and his family; (ii) for excepting from the property to be realised, the debtor's home, personal effects and tools; (iii) for excepting from the property to be realised the debtor's business premises and property required for the business, and for the postponement of payment of his debts. It is only the third power which is an innovation on the Bankruptcy Acts, and its effect is lessened by a proviso that in exercising it, the court shall have regard to the likelihood of ultimate benefit to the creditors, as well as to the debtors (s. 4 (3) (*c*)). The interpretation put by the courts on this proviso will go far to determine to what extent creditors will be satisfied to agree to schemes of arrangement before the L.A.O. S. 8 provides that where the court allows the debtor to remain in possession of any property, it shall make provision in the adjustment order for securing the payment of sums payable by the debtor in respect of the property after the date of the protection order, and, in particular, rent, rates, taxes, mortgage interest and repayments, and insurance premiums. S. 4 is further hedged in by a system of priorities under S. 9. These are, in effect, (i) any provision the court may have made for the maintenance of the debtor and his family, payments secured under s. 8, and the costs of the proceedings; (ii) priorities under s. 33 (1) of the Bankruptcy Act, 1914—which include one year's rates and taxes; (iii) lastly, other proved debts. A really fresh attitude to a fresh problem might have avoided the perpetuation of the privileged position of local authorities and the state. The first brunt of any sacrifices which are to be made for the preservation of war-impoverished middlemen would have fallen with perfect propriety on the shoulders of the rate and tax paying public at large.

Apart from powers parallel with those under the Bankruptcy Act,

[9] The example is within the writer's experience and there is no doubt that it will be paralleled all over the country. The tactic is regularly employed by local authorities to obtain payment of electricity accounts after a receiving order in bankruptcy has been made. It is interesting to note that the leading cases on the point, which relate to gas and water, are cases brought to recover money paid under protest. *Re Smith, ex parte Mason* (1893), 1 Q.B. 323. *Re Flack, ex parte Berry* (1900), 2 Q.B. 32. Where the threat is to cut off such services, payment comes first and argument afterwards. A protection order, under which "no proceedings shall be commenced and no remedy shall be exercised" (s. 3 (2) (*b*)) might prevent the exercise of statutory powers of this kind, but it is quicker to disconnect the supply than to obtain a protection order. Besides, the threat will usually be sufficient.

1914, to disclaim property and rescind contracts, (s. 5) the court, in making an adjustment order, is given novel powers of considerable interest in s. 6. If the lettable value of the premises has fallen as the result of war circumstances, the rent under a lease may be reduced, but not so that it is less than the lettable value of the premises at the date of the order. "Lettable value" means the rent at which the premises might reasonably be expected to let from year to year upon the other terms and conditions of the lease; s. 28 (1). Long tenancies reserving a rent in excess of the present value of the premises have been one of the severest worries of the small trader,[10] and this power of the court may prove useful. Landlords, on the other hand, have no cause for undue pessimism. Land values have rocketed in reception and government developed areas although trade difficulties, which only exceptionally result from lack of potential customers, may remain acute in these places. In blitzed areas, while the condition of any particular property may have deteriorated, its lettable value, in circumstances of acute shortage of accommodation, may actually have increased.

Where the debtor is in possession of goods under a hire-purchase agreement, the court may, in the adjustment order, vest the goods in the debtor, provided that he has paid already an amount at least equal to the value of the goods at the date of the order. The hirer, in such a case, will lose his right to retake possession, but may prove for his balance in the proceedings.

S. 6 concludes with a provision which illustrates the difficulty of maintaining the traditional theory of contract in the modern state. Where it appears to the court that it would be in the interests of all parties under a contract, other than a lease or hire-purchase agreement which could be disclaimed under s. 5, that the contract should continue in effect in a varied form rather than be disclaimed, the court may, in the adjustment order, vary the contract accordingly, but not so as to render it inconsistent with any statutory rule or regulation. In view of repeated judicial warnings that the court abhors making a contract for the parties before it, it is doubtful whether the judges will take this power to their hearts; but it remains of considerable theoretical interest.

Mortgagees remain privileged for the same bad reason that was advanced to relieve them of most of their responsibilities under the War Damage Act; the personal covenant gives them sides of brass. They may realise their securities and prove for any balance; or surrender the security and prove for the whole debt; or have the security valued and prove for the excess of the amount secured over the value. The first option needs the permission of the court for its exercise. If the property is retained, liability on the personal covenant subsists, but the court may order a reduction of principal and interest payments for the period during which the order is in force. The interest, however, must not be reduced below the net annual value of the property (s. 7).

Ss. 14 and 15 apply the Act to partnerships and private companies. S. 15 (3) pierces the veil. "The court shall, in considering whether it is practicable and proper to deal with the affairs of a company—have regard to the constitution and history of the company and the means of the members and officers thereof." S. 23 extends the Act to the Crown.

When the debtor had paid the debts and other sums provided for in the

[10] Such tenancies have paradoxically been responsible also for keeping open shops which would otherwise have closed. If the trader cannot rid himself of an onerous lease, he may as well continue the business for what it is worth.

adjustment order, he may apply for an order of discharge, which releases him from all debts provable in the proceedings except those which would not be discharged by an order of discharge from bankruptcy (s. 12).

The efficacy of the Act will depend on its own strength, and the widely expressed opinion that it will fail unless creditors are awake to the need for conciliation is foreboding. Private creditors can hardly be expected to exercise greater foresight than the public authorities which have taken steps to ensure that their share of the loss will be minimal. Since the Act comes to the rescue only where the debtor is in serious financial difficulties, the principles of first-aid applied were naturally drawn from the bankruptcy handbook.[11] Mr. Moelwyn Hughes, in welcoming the Bill, said that it allowed for "bankruptcy without busting, insolvency without insult."[12] It would have been remarkable had Parliament spent its time and trouble out of a nice concern for the delicacy of feeling of war-time debtors, and the Act has collateral effects more substantial than that of providing a shield against obloquy. It is delusion, however, to imagine that so grandiose an object as the national preservation of small-scale business will be accomplished, and the officers and judges who have this duty set on them may well be perplexed. The Attorney-General must have had his tongue in his cheek when he introduced the measure as one to enable a man to "tide over an adverse period," until "times become normal again," when he will "be able to carry on with equal efficiency and equal financial success."[13] The cause of the depression of the small trader is the legitimate war-time policy of restriction, deliberately designed, in part, to divert the energies of the trading classes to more essential employment. The injustice lies not in the existence of these restrictions and their inevitable consequences, but wherever the burden is unequally distributed. The remedy can only be palliative, but it would be best applied at the source, in ensuring, for example, a fair and speedy distribution of available supplies and a complete and efficient rationing system. As it is, this Act is a remedial Act, and will do more good than harm.

MORRIS FINER.

[14] The bankruptcy laws have been suspended, not certainly *de jure* but *de facto*. The suspension has been achieved by s. 21 of the Liabilities (War-time Adjustment) Act, which establishes that "nothing done or suffered by any person under, or for the purpose of taking advantage of, any provisions . . . of this Act shall be deemed to be an act of bankruptcy, and nothing so done or suffered shall disqualify any person from any office. . . ."

As we live all of us under the extraordinary conditions of war, any trader who becomes insolvent will no doubt be able to show how far his

[11] There are about a dozen direct references to and applications of various sections of the Bankruptcy Act, 1914 (including applications in the Rules) and several provisions parallel to bankruptcy provisions. Moreover, the embryo of the whole scheme can be traced to the comparatively little known County Courts Administration procedure, which itself reproduces s. 122 of the Bankruptcy Act, 1883. See the County Courts Act, 1934, ss. 149–157, *Annual County Courts Practice*, pp. 257–283.

[12] *Hansard*, Vol. 371, col. 95.

[13] *Ibid.*, col. 279.

[14] The comparative aspect is of paramount importance in connection with the preventive adjustment of insolvencies. Dr. Harnik, the author of these notes, is the author of a comparative treatise on this subject (*Der gerichtliche Ausgleich*), which appeared in 1928.

position has been influenced by war circumstances and so he will gain access to the benefits of the Liabilities (War-time Adjustment) Act.

It is evident that the Act owes its origin to the intention of protecting the innocent debtor who "owing to war circumstances" has come into difficulties, against the odious consequences of bankruptcy, but we may expect that even in creditors' circles we shall hardly meet with any complaints of missing bankruptcy proceedings.[15] The solution of the question of how to reconcile in the case of adjustment proceedings the debtor's interests with those of the creditors is entirely left to the court. The court will of course make ample use of competent experts and especially of the services of the Liabilities Adjustment Officer, to whom it has been particularly referred by the law. The adjustment officer is to be the chief pillar of the procedure from the beginning up to its end. The influence of the assembly of the creditors which in bankruptcy proceedings plays an important part, appears completely suppressed. For the moment it is difficult to judge about this fundamental innovation. Only experience will show whether the nullification of the creditors' influence is possible without any unfavourable effects.

The adjustment order is to be an answer to the following questions: Considering the economic position of the debtor and the given structure of his estate, having further in view his previous commercial behaviour and the prospects of his future, what payments to his creditors may be justly imposed upon him and how are they to be effected? What parts of his assets could be realised without destroying the foundations of his future existence? Considering, on the other hand, the compulsory discharge of the debtor after his having complied with the adjustment order, what losses may rightly be imposed on the creditors? To deal with this problem will certainly be tremendously difficult. Even with the assistance and the best preparations of the liabilities adjustment officer we cannot expect these difficulties to be always eliminated.

The adjustment order is fortunately not the main provision of the Act. Of far greater importance will be those provisions which deal with the private procedure before the liabilities adjustment officer and have for their object to enable the debtor to arrive at an arrangement with his creditors. In order to start the procedure the debtor has to apply to an adjustment officer for the county court district in which he resides or carries on business, or has resided or carried on business for the greater part of the last six months. He has to give the adjustment officer all the information referring to his position and to the circumstances by which it has been caused. If, after considering the information given to him by the debtor and the debtor's proposal for a scheme of arrangement, the adjustment officer considers that there is prospect of bringing about an equitable and reasonable scheme of arrangement, he is to get in touch with the creditors. He has to send to every creditor a summary of the debtor's affairs and of his proposal for a scheme of arrangement, and to require the creditors to prove their debts. He may communicate with any of the creditors and may, at whatever stage he thinks fit, summon a meeting of the creditors. He may also adjourn the meeting from time to

[15] According to the General Annual Reports by the Board of Trade, more than half of all windings-up in bankruptcy cases are generally closed without any dividend. But quite similar complaints are to be constantly heard from abroad (see the Deliberations of the 1st International Congress for the Protection of Credit-Report Oppenheim).

time as he thinks fit. But in contrast to the procedure before an Official Receiver, it is by no means compulsory to call a meeting of the creditors. When the debtor has succeeded in collecting so many assents by his creditors as to have reached a majority in number and value, the adjustment officer may approve the scheme. The approved scheme of arrangement is binding on all the creditors and may be enforced by the court. The dissenting creditors are, however, entitled to appeal to the court against the approval of the scheme on the ground that it contravenes the law in any way or that it is unequitable or unreasonable. As this appeal does not suspend the validity of the approved scheme, it is advisable that the appellant should apply to the court to issue an order suspending the provisions of the scheme. The court may on any appeal vary or revoke the scheme.

Should on any appeal the scheme be revoked or should a majority not have been obtained and should, therefore, the necessity arise of applying to the court for an adjustment order, the adjustment officer will again have an opportunity to make his opinion prevail. His plan for an adjustment order will hardly be more favourable for the creditors than the scheme of arrangement which has been rejected by them.

The best qualities of the procedure before the adjustment officer consist in its being private and completely independent of any public proceedings before the court. This opportunity of settling his affairs in quite a discreet way may encourage the debtor to do his utmost and may also stimulate his friends to give their assistance, even to make sacrifices, in order to enable the debtor to come to an arrangement with his creditors. We may perhaps expect that the arrangement under the Liabilities (War-time Adjustment) Act will become the regular settlement of normal insolvency cases during the war.

It seems unimaginable that the insolvency legislation should not take the experiences gained under the Act into account when the time for repeal of emergency laws comes. Should the practice of the scheme of arrangement, effected by the services of a liabilities adjustment officer, prove satisfactory, it would be inconceivable that the lawgiver should not accede to the wishes of commercial circles which will no doubt ask for the institution to be adapted to normal conditions and continued. It must not be overlooked that proceedings of this kind have long since been introduced in nearly all the states of the world and the assimilation of English laws to what has been proved necessary in other countries is inevitable.

The acceptance of a proposed arrangement by simple majority in number and value may be justifiable in war-time. The debtor may rightly say that the war that has caused his ruin, is not his business alone and it is only fair that his losses should be borne partly by the creditors. Another thing is to decide on the proposal of an insolvent debtor in normal time. Regarding such decisions the legislations of all civilised states, in regulating official agreement without bankruptcy procedure, have adopted the principle of qualified majority in value (mostly three-quarters) beside the majority in number. But quite apart from the question of how to qualify the majority it will be indispensable to protect the dissident creditors against votes subject to influence and to exclude the near relations of the debtor from voting, as is provided by most other systems of legislation.

There will be quite a number of important questions concerning the procedure for an arrangement without bankruptcy procedure, but of the greatest importance will certainly be the problem of how the functions are to be distributed among the court, the expert officer and the assembly

of creditors. According to several legal systems (e.g. Czecho-Slovakia, Jugo-Slavia) the so-called administrator of the arrangement is merely an assistant of the court; his duty is only to give the court his report and to express his opinion about the acceptability of the debtor's proposals. He has neither to negotiate with the creditors nor to try to influence their decisions. The assembly is presided over not by him but by the judge, who, the majority having been reached, decides upon the question of approval. According to Swiss Law the expert officer himself presides over the assembly, receives the votes of creditors and informs the court on the outcome of the voting. In the case of its being affirmative he gives his opinion about the question of approval. A similar solution has been adopted by the Norwegian system, at the same time, however, combined with the idea of creditors' autonomy, the expert functions having been vested not in one person but in a committee of three members, two of whom as a rule shall be creditors. The third member, the so-called commissioner, is generally a professional accountant. By request of one-fifth of the creditors the approval of the arrangement by the court is to be made dependent on appointment of an inspector who is to remain in office until the duties according to the arrangement have been fulfilled.

The Liabilities Adjustment Officer has been empowered to decide himself upon the approval of the scheme. Whether this is psychologically compatible with the duty to assist the debtor, whether the adjustment officer will be able to advocate the scheme as well as to judge of it, only future experience can show.

MANUEL HARNIK, DR. JUR.

The Finance Act, 1941

Income Tax reached its record "all-time high" in this year's Finance Act by the increase in the standard rate of tax to 10s. in the £; it should be noted, however, that the *effective* rate of tax is much below this for most incomes by reason of the personal allowances to which the taxpayer is entitled and the charging of the first £165 of taxable income at the reduced rate of 6s. 6d. in the £, e.g. in the case of a married man earning £1,000 per annum, his effective rate of tax is only 7s. in the £. When, however, one comes to the higher ranges of income and to the sur-tax, taxation becomes well-nigh confiscatory since, for example, in the case of very large incomes, income tax and sur-tax amount to no less than 19s. 6d. in the £ in respect of all taxable income in excess of £30,000. It has been estimated that in order to produce a net spendable income of £10,000 per annum, one would have to enjoy a real income, before taxation, of over £200,000! This high rate of income taxation seems to put beyond the realms of practical politics any question of a *general* capital levy (whatever may be said for an *increment* capital levy, i.e. one based on the difference between pre-war and post-war capital), since the aggregate loss in future revenue would probably exceed the saving in interest due to the reduction in government indebtedness resultant from the proceeds of the levy. The late Lord Stamp estimated (*Current Problems of Finance and Government*, 1923) that with the then rates of tax (5s. in the £ standard and 6s. in the £ super-tax on the highest bracket of income) a £3,000,000,000 levy would save £142,000,000 per annum in interest on the National Debt (then about 5 per cent), against which would have to be set a loss of £70,000,000 per annum in income tax and super-tax and £28,000,000 in

death duties, leaving a maximum net saving of some £50,000,000 per annum. Owing to the reduction in the rate of interest on the National Debt resultant from the country going off the Gold Standard in 1931, and the subsequent conversion of War Loan to a 3½ per cent rate, the probable annual saving in 1936—with taxation in the highest bracket of income at 8s. 3d. in the £—has been estimated at about £20,000,000. It is clear that, with the prospect of war taxation at confiscatory rates continuing for some years after the war, there would not only be no gain in revenue from a similar capital levy, but that owing to the almost insuperable administrative difficulties in assessing and levying such a tax, there would be a positive loss. One adverse effect of a standard rate of 10s. in the £ is that this rate applies to the undistributed profits of business concerns with the consequential depletion of their liquid resources which are required for the post-war reconstruction and/or replacements. A rebate of tax in respect of undistributed profits has been suggested and this might work not unreasonably in the case of what are termed "public" companies, though there would be a not inconsiderable loss of sur-tax through an almost inevitable restriction of dividends; such a solution is, however, impossible to contemplate by reason of the tremendous loophole it would open to "legal avoidance" of tax by reason of the modern device of incorporation of one person or of a few persons into a "private" limited company—a device which has already become so popular with the wealthy classes as a means of evading tax and which has led to remedial legislation often made retrospective (see notes on this topic at 1 M.L.R. 292/3 and 53 L.Q.R. 136).

It is not proposed to consider the clauses of the Finance Act in detail, since such a consideration is hardly appropriate to the underlying idea behind the Modern Law Review. A brief note on the more interesting, together with comments on their economic aspects, would not seem out of place and the Act will therefore be considered under the two main heads of Income Tax and Excess Profits Tax.

The most noteworthy section of the Income Tax part is that dealing with the crediting to individuals of the additional tax due to the reduced personal reliefs, etc., imposed by the Act; the amount of this extra tax is to be recorded and notified to the taxpayer and it is to be credited to him as soon after the end of the war as the Treasury may decide. The Chancellor, in introducing the Budget, stated that these sums would be credited to a Post Office Savings Bank account in the taxpayer's name, but the Finance Act contains no suggestion of this and it may well be that the sums standing to the taxpayer's credit will, in the first place, be set against any outstanding liability to tax; incidentally it is provided that any assignment or charge of such credit shall be void.

Ss. 10–11 provide a long-needed reform—see note at 1 M.L.R. 294—by which farmers are made to pay on their actual profits in the same way as any other business man and not on a purely notional figure, viz., the annual value of the land; this provision, however, does not apply to holdings of land where the annual value does not exceed £300, in which case the old basis still applies. No doubt administrative difficulties and the absence of reliable accounts may explain this "gift" to the smaller farmers, but since there has always been the right to pay on actual profits if these were less than the notional profit or annual value, no reason is seen why—in view of the present prosperity of the agricultural industry—the notional profit should not be fixed, as in the last war, at *double* the annual value.

A novel side of the war economy is the scheme for concentration of industry under the auspices of the Board of Trade; certain factories are to be closed down and their production transferred to "nucleus" concerns in such a way as to preserve the goodwill of the "displaced" concern. Ss. 18 and 37 provide that, both for Income Tax and Excess Profits Tax, the "displaced" concern shall not be regarded as having ceased to be carried on and that the payments made to it by way of compensation by the "nucleus" business shall be regarded as normal trade receipts in the case of the former business and as proper business expenses in computing the profits of the latter concern.

Strong feeling was evinced during the passage of the Finance Bill through Parliament that all classes of the community should *personally* bear the extra burden of war taxation; this was most emphatically not so in the case of those persons who were in receipt of "free of tax" annuities, alimony payments or salaries. Moreover, when the wills or settlements or contracts, under which these payments arose, were made, there could never have been contemplated the present ferocious rates of taxation; as a result the huge increases in taxation imposed an almost insuperable burden upon the persons liable to make such payments "free of tax"; s. 25 enacts broadly that where a pre-war will, settlement, Order of the Court, or contract provided for the payment of a *stated amount* "free of tax," such stated amount shall be abated to twenty twenty-ninths thereof. This means that the payer has to find the same gross sum as before the war, but that the beneficiary bears the extra tax imposed by the War Budget. Where sur-tax is involved, special provision is made to avoid hardship by excessive "grossing-up' due to earlier war budgets, while the difference between pre-war and war surtax has to be borne by the recipient. In the case of "free-of-tax" salaries, s. 26 provides that the employer has to pay tax only on the basis of the pre-war "rates of tax," the employee being left to bear the difference; here, too, there are similar compensatory provisions in respect of liability to sur-tax. It should be noted that these provisions do not apply to pre-war contracts varied after the outbreak of war, to company dividends, or to dividends or interest paid by Building Societies.

Turning now to Part III of the Act, which deals with Excess Profits Tax, s. 28 is of special interest in that it provides that the difference between the trader's liability at 100 per cent. and at 80 per cent., for the period from 1st April, 1940, to the termination of hostilities, shall be ascertained, recorded and repaid to the taxpayer—at such date and *under such conditions* as Parliament may hereafter determine! It has been well said that the taxation of war-wealth is dangerous if it checks the economic incentive to efficiency, but useful if it reduces the cost of obtaining such efficiency and in so far as it is effective in equitably distributing the economic burden of war; it is clear that a 100 per cent tax is an incentive to wasteful expenditure by the taxpayer, and the "carrot before the donkey's nose" of a 20 per cent refund after the war may well induce a certain tendency to economy, since for every economy of £100, £20 will be available to the taxpayer in the difficult post-war days. A sub-committee of the Ministry of Reconstruction (1918–20), viz. the Committee on Financial Risks, recommended, in the case of the comparable Excess Profits Duty in the last war, that part of the duty should be put to a suspense account to be used as a refund to the taxpayer in the case of wide fluctuations in the prices of trading stock—the proposal never received legislative sanction.

The present scheme obviously owes its origin to this device, but it is to be noted that the refund is not *unconditional*, as in the case of the analogous income tax credit (see above), but is only to be made if the taxpayer satisfies certain unspecified conditions, some of which will no doubt be that no portion of the refund shall be paid away in dividends or otherwise distributed and that it shall be wholly expended on replacing or restoring fixed assets or otherwise in putting the business on its feet again.

Another noteworthy section is the one whereby "borrowed money" is to be regarded as capital employed in the business and the interest thereon deemed part of the business profits; there is no doubt that the object of this section (29) is to encourage the borrowing of money by war industry in order that the necessary expansion of plant may take place whereby the country's war effort may be advanced. Though all borrowing is of an inflationary character, it is more important to develop the country's war potential. The reader may wonder where the "encouragement" comes in—that is easily explained. Where a company's capital is increased over the pre-war amount, its standard profits are increased by 8 per cent on the amount of the excess thereby reducing the sum liable to Excess Profits Tax; since the amount of interest to be added to profits is, say, 5 per cent of the amount borrowed, it will be seen that the effect of this section is to reduce the profits chargeable to Excess Profits Tax by 3 per cent on the amount borrowed; with the rate of tax at 100 per cent, there is undoubtedy an encouragement to the expansion of plant and buildings which, in war-time, can normally be financed only by borrowing, since the issue of new shares is very difficult in such conditions. It is interesting to note that the treatment of "borrowed money" as capital is compulsory and not at the taxpayer's option, though a clause to grant the latter was introduced, but rejected, during the passage of the Finance Bill through the House of Commons. If the amount of "borrowed money" has been reduced since the standard period, this reduction will increase the amount of the taxpayer's excess profits by, in the case of a company, 3 per cent on the amount of the reduction (c.f. *supra* as regards the effect of a corresponding increase). It seems to the writer most inequitable that so artificial a computing of business capital as treating "borrowed money" as part of the trader's business capital should result in actually increasing his liability to tax; it is to be hoped that the "optional" clause will be reintroduced and become law in the next Finance Act.

The relief given by s. 27, Finance Act, 1940, to businesses with low pre-war standards and to depressed industries is increased both by the borrowed money provisions referred to above and by standard capital being able to be increased by the amount of any aggregate loss sustained in the business since 1929. This latter principle is not to be indiscriminately applied since the fixed assets of a business may have disappeared, in whole or in part, as a result of such losses; in such cases power is given to the Revenue, subject to a right of appeal to the Board of Referees, to disregard such increase or to abate it as seems just.

As is well known, the British scheme of taxation of business profits disregards capital profits and forbids any allowance for diminution, reduction, or withdrawal of capital; one result of this is that tax is paid on the full amount of the profits without any allowance for "wasting assets" (see *Coltness Iron Co.* v. *Black* (1881), 6 App. Cas. 315, and *Alianza Co., Ltd.* v. *Bell* (1906), A.C. 18, and note at 3 M.L.R. 317 8). S. 31 provides that, in the case of concerns producing certain metals and oils,

additions to the standard profits may be made where, *and only where*, the Treasury is of the opinion that an increase in current output beyond that at the normal rate is essential in the national interests by reason of the produce of the concerns being of exceptional importance for the prosecution of the war. Such additions are not to exceed stated percentages, varying according to the remaining life of the "wasting assets" of the concern, of the normal profit on the additional output. This relief is given because the additional production due to the war is eating up the wasting assets of such concerns at an abnormal rate. It may be noted that in America very generous treatment is afforded in the taxation of concerns with wasting assets, e.g. in the case of oil concerns, they are allowed a deduction from profits for what is termed "depletion," which can amount to as much as 27½ per cent of the gross income of the concern with an over-riding maximum of 50 per cent of the *net* income before such deduction. This is probably due to the principle laid down by the Supreme Court in *Doyle* v. *Mitchell Bros.* (1918), 247 U.S. 179, viz. that in order to determine the amount of any profit, there must be withdrawn from the gross proceeds of the business an amount sufficient to restore the capital value which existed at the commencement of the particular accounting period.

To conclude this very bare account of the provisions of the Act relating to Excess Profits Tax, reference may usefully be made to s. 35, which gives the Commissioners of Inland Revenue power to disregard transactions designed to avoid liability to the tax; this has been found necessary because of the ingenuity of too many "patriotic" business firms in finding means of "legally avoiding" paying over their excess profits to the state. One such device is the buying-up of concerns doing poorly since the war but with good pre-war years; the effect of this is to boost up the standard of the prosperous concern with little or no effect on its war profits chargeable to Excess Profits Tax.

A. Farnsworth.

NOTES OF CASES

Recent Developments in the Law of Charitable Trusts

The privileges of charitable trusts and gifts continue, with their usual frequency, to come before the courts for interpretation. As was generally expected, the privilege of uncertainty was allowed by the Court of Appeal to validate the trust in *Re Ward* (1941 57 T.L.R. 473), when the decision of Farwell, J., was reversed (*ibid.* 326). His decision has been noted in the previous number of this REVIEW. It was a surprise to MacKinnon, L.J., in the light of the traditional fourfold classification of charities, that a trust for "religious purposes" with a discretion in the trustees limited to Roman Catholics in the British Empire should be thought to fail for uncertainty. There were some considerations arising out of the phraseology of the will as a whole which impressed the judge of first instance, but, in the words of Luxmoore, L.J., "there is no canon of construction which denies to a testator the privilege of indulging, to some extent, in tautology" (*p.* 476). In *Re Mylne* (1941, 1 All E.R. 405) Farwell, J., found no difficulty in holding that persons engaged in evangelistic work, including missionaries, active or retired, and continuing Christian workers were good objects of a charitable trust, not on the ground of the relief of poverty but because the trust was for the advancement of religion. In stressing "the fact that the gift includes retired missionaries may encourage other people to take up missionary work," Farwell, J., was using the same reasoning as that of Bennett, J., in *Re Forster* (1939, Ch. 22, 25), in this respect a similar case, though not referred to. The point in *Re Mylne* which was more doubtful was that the trust was confined to those missionaries and workers who should be protestants of a certain type of religious belief, clearly a condition which was not strictly capable of objective verification. But the case was distinguished from those in which a subjective religious test is the condition of a non-charitable gift. As Farwell, J., said, "a condition by which a person forfeits an interest must be construed strictly," but in the case before him it was "possible for the trustees, by making inquiries, to ascertain whether a particular person is suitable. The condition may impose some difficulty on the trustees, but it is not one which it is impossible to fulfil. It differs from a forfeiture clause. It is merely a question of the trustees making a selection of a class of persons." In *Re Mylne* the spiritual requirements were imposed on persons who were already objects of charity on account of their calling. All forms of religious life and practice are not within the legal fold of charity as is shown by the well-known decision in *Cocks* v. *Manners* (L.R. 12 Eq. 574), where a contemplative order of nuns was distinguished from other orders. This case was referred to but not disapproved of in *Re Ward*. That it is good works rather than faith which equity favours is shown by Bennett, J.'s, opinion that Mr. Buchman's Oxford Group is not an object of a charitable trust: *Re Thackrah* (1939, 2 All E.R. 4), a decision which has not passed uncriticised, e.g., C. de B. Murray's article in *The Scots Law Times*, Sept., 9, 1939.

Simonds, J., is not alone in thinking that "there is no branch of the law so artificial or in which it is so difficult to reconcile conflicting authorities as this question of general charitable intention": *Re Lawton* (1940, Ch. 984, 986). Residuary estate had been left to the trustees of a parish church to be used for any purposes authorised by the trust deed under

which they operated; there were not and never had been any trustees of the church and there was no trust deed. Simonds, J., declared that "it is a cardinal principle that, where you find a general charitable intention, the gift does not fail by reason of want of trustees," and, finding no general charitable intention in the will, the gift failed for uncertainty: had there been any trustees they might have held the fund for non-charitable as well as charitable objects. But *Re Lawton* is not in reality a case of the failure of trustees because the testator did not purport to appoint any; it is a case of the non-existence of legatees who, if they had existed, would not necessarily have been trustees holding for exclusively charitable purposes. It falls within the narrow principle which was affirmed by the House of Lords in *Farley* v. *Westminster Bank, Ltd.* (1939, A.C. 430). The distinction between a particular charitable intention and a general charitable intention was also presented to Simonds, J., in *Re Royce* (1940, Ch. 514) when he also complained that it was "a very artificial distinction." It has at least four different applications, including that of the *cy-près* doctrine, and has overshadowed the old distinction between the Substance and the Mode of a charitable disposition, although the two distinctions are not perhaps quite coincident. In *Re Royce* the presence of a general charitable intention enabled a *cy-près* application to be made of an immediate surplus of a bequest "for the benefit of the choir" of a named church, it being obvious from the beginning that the gift was far larger than was required by the particular choir. This is an almost unprecedented instance of the working of the *cy-près* doctrine, and there is reason for thinking that *Re Royce* is not in accordance with the reasoning behind the long line of *cy-près* decisions: *vide* "The *Cy-près* Application of Surplus Charitable Funds," by the present writer, *The Conveyancer*, March, 1941, *pp.* 198–212.

The development of the *cy-près* doctrine has been a conflict between the common law's preference for the claims of the heir and next of kin and equity's leaning in favour of charity. In this conflict between public and private interests the former have usually been the victors. The opinion which was championed by Chief Justice Holt, rejected with doubts by Lord Eldon, and hankered after by some chancery judges was pointedly expressed by Twisden, J., "who, when a matter was pressed in behalf of a charity that he thought to be against law, replied, I like charity well, but will not steal leather to make poor men shoes": *Att.-Gen.* v. *Sutton* (1721), 1 P. Wms. 754, 765–766.

That the distinction between a particular and a general charitable intention may still be fruitful of new privileges for charities is suggested by Farwell, J.'s, explanation in *Re Ward* (1941, 1 All E.R. 315, 317) of his overruled decision in *Re Diplock* (1941, 1 All E.R. 193, C.A.; 1940, 3 All E.R. 538)—the "charitable or benevolent objects" case. Farwell, J., made plainer than did, perhaps, his original judgment that he "thought that there was a sufficient general charitable intention disclosed in the will as a whole to justify the reading of the words in question as being confined to that which was strictly charitable." Farwell, J.'s, judgment in *Re Diplock* is one of the first occasions on which a "general charitable intention" has been specifically relied on for the purpose of interpreting the particular wording of a disposition. In reversing the decision of the court below, it is not quite clear whether the Court of Appeal thought that it would never be possible to employ the notion of general charitable intention for the purposes of verbal construction. Greene, M.R., could

not "appreciate the force of the word 'overriding'" in connection with the argument that in the will "there was a context consisting of what was described as an overriding charitable intention." He thought that "in order to have any force at all for present purposes, a context which is sufficient to restrain and limit the natural meaning of the word 'benevolent' must be found, and that context is not to be found in the fact that the testator has given charitable gifts, or in the fact that he has put his charitable gifts first, or in the fact, if fact it be, that he had a preference for charitable gifts" (*ibid.*, 201). But it is precisely considerations such as these from which equity deduces a general charitable intention in connection with the *cy-près* doctrine. And that doctrine frequently operates contrary to the intention of the testator, as has often been pointed out in chancery, not in fulfilment of it as did the overruled decision in *Re Diplock*. To concede this special rule of construction to charitable dispositions in order to give effect to the intention of the testator would be a small privilege compared to those which have been so boldly introduced in the past and extended in the present. It is the subtle instrument of general charitable intention rather than the forthright criticism of Goddard, L.J., which may enable the House of Lords to restore the decision of Farwell, J. In *Hunter* v. *Att.-Gen.* (1899, A.C. 309) the House of Lords overruled a strong and unanimous Court of Appeal which, in effect, had employed the same reasoning as that of Farwell, J., in the instant case, and Lord Halsbury, L.C., as always, a strict interpreter, scorned the notion of a general overriding charitable intention. But Lords Watson, Shand, and Davey did not make up a House adept in the unrolment of the peculiar principles of English equity with regard to charities. More recently, in *Re Knox* (1937, Ch. 109) Luxmoore J. in interpreting the expression "nursing home" explicitly relied on the notion of general charitable intention and found that it led to the conclusion that a charitable nursing home was intended by the testator although a nursing home is not necessarily a charitable object.

The ever-growing content of the traditional fourth class in the definition of charity is illustrated by *Re Corbyn* (1941, 2 All E.R. 160) in which Morton, J., held that a bequest for the training of boys in the British Mercantile Marine was charitable. He would have upheld it as being for the advancement of education but for the presence of an ancillary direction in the bequest. There was a direction that each boy should be given a monthly allowance of money to enable him to keep up the dignity and appearance of an officer and a gentleman. One cannot record as a recent development that gentlemen have become objects of a charitable trust either under the first or the fourth class, but Morton, J., held that the direction did not invalidate the trust. It was for the public benefit that the Mercantile Marine should be kept going and "a boy might be prevented from following the career in question because of the lack of means over and above his pay."

W. H. D. WINDER.

Frustration—Self-induced Frustration—Onus of Proof

The importance of *Constantine S.S. Line* v. *Imperial Smelting Corporation*, [1941] 2 All E.R. 165, lies not only in the actual decision but in the opportunity that it gave the House of Lords to review certain aspects of the law relating to impossibility of performance, failure of consideration,

and frustration.[1] The action was brought by the charterers of a ship, the *Kingswood*, against the owners for damages for failing to load a cargo. The failure to load occurred because of an unexplained explosion that had taken place on the ship the day before she proceeded to her berth, which caused such damage that it was impossible for the vessel to undertake the voyage. Did this event discharge the owners? The first point of interest is that all the judges assumed that the owners were excused in law if the explosion occurred without their fault. This was not because of the exceptions clauses in the charterparty, for the ship was not an "arrived" ship at the date of the explosion, and thus the exceptions clauses had not attached. Nor was it simply because of the principle of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, because that decision covered only the case of a "given thing" which "perished." Even if the damage done to the music-hall was repairable, it clearly could not have been repaired in time for the fixed-date performance. Here, however, the vessel was repairable; and moreover there does not seem to have been any definite time fixed in the charterparty for performance, so that it could not be said that the vessel constructively "perished" *quoad* a fixed-time performance. Nevertheless the charterers did not dispute "that the time needed to repair the damage and to make the *Kingswood* fit for her voyage was so great as to frustrate the commercial object of the adventure" (per Viscount Simon, L.C., at p. 168). It was evidently for this reason that the occurrence of the damage to the ship was held to be capable of excusing the owners in law. The analysis of a case of this sort seems to be twofold. First, the owners are not liable for non-performance during the period of physical impossibility of performance, because this is a sort of "temporary perishing" within a principle analogous to that in *Taylor* v. *Caldwell*. And second, the owners are not liable after the vessel is repaired, because they are then discharged by the doctrine of frustration in the narrow sense —*i.e.* inordinate delay caused by temporary impossibility for which the promisor is not responsible in law.[2] The decision under review appears to be the only one that clearly extends the principle of *Taylor* v. *Caldwell* to discharge a promisor during a temporary unavailability of the "given thing," where the performance is not to take place on a fixed date, and to a certain extent it renders unnecessary the common exceptions clauses in charterparties.[3]

The only difficulty was caused by the rule of law that a "self-induced" impossibility, failure of consideration, or frustration, does not constitute a defence. Does this rule cover an event that is the result not of an intentional act but of negligence? It was held by the Court of Appeal that it does, and the correctness of their view was admitted for the purpose of argument before the House of Lords by counsel for the owners. Owing to their decision on another point it was not necessary for their Lordships to pronounce upon the matter, but some doubt was cast upon the broad proposition that an event that occurs through the negligence of the

[1] The speeches speak chiefly of "frustration," but this is evidently used in a generic sense to include impossibility of performance and failure of consideration, besides discharge for inordinate delay. See *post*, and, generally, McElroy, *Impossibility of Performance* (Cambridge University Press, 1941).

[2] See the analysis of this in McElroy, *op. cit.* The requirement that the cause of the delay should be one for which the promisor is not responsible in law is not generally included in statements of the rule, but it is submitted that it is essential.

[3] Dr. McElroy, writing before the decision in the case under review, rejected the opinion expressed above: see *op. cit.*, pp. 139–40.

defendant or his servants cannot constitute a defence. Viscount Simon (at p. 173) suggested that the proposition might not apply to contracts that become impossible of performance through the death or illness of the person who was meant to perform. He instanced a *prima donna* who loses her voice through carelessly omitting to change her wet clothes after being out in the rain. At the same time, he seemed to think that in ordinary commercial cases mere negligence in bringing about the event would suffice to prevent discharge. Lord Russell (at p. 182) left open the entire question what "kind or degree of fault or default on the part of the contractor will debar him from relying on the frustration." So did Lord Porter (pp. 195, 197, 198, 199), but he did say that he imagined "that an accidental injury to a contractor preventing performance, though resulting from his own negligence, would be regarded as an accidental consequence, or one of the ordinary incidents of life, rather than as caused by the default of the party." Lord Wright (p. 193) said, with regard to "frustration" in general, that "mere negligence seems never to have been suggested as sufficient to constitute fault in this connection . . . However, a case of gross delinquency might perhaps be construed as amounting to a repudiation of the obligations of the contract. I do not here think it necessary to attempt the definition."

If comment upon any words of Lord Wright be not regarded as too audacious, it is submitted that authority ought hardly to be needed for the proposition that a person who has entered into a contract is (to say the least) under a duty of care to the other to perform it. If through his own carelessness he makes the contract impossible of performance, surely that ought to be regarded as a breach of contract. To say otherwise is to reduce the contractual obligation to very slender proportions indeed. Suppose, for example, that a person who has sold but not yet delivered specific goods omits to take due care of them, so that they perish; surely his obligation is not discharged. The Sale of Goods Act, s. 7, expressly confines itself to a case where the goods perish without any fault on the part of the seller or buyer, and s. 62 defines fault as meaning "wrongful act or default." Of this definition Lord Wright said (p. 192) that it is "perhaps not very helpful"; but it may be thought that if the draughtsman had meant to exclude negligence from the ambit of the word "fault" he would have said so. Moreover, it is not difficult to find judicial authority for the view that a contractor who is negligent is not released from his obligation by impossibility of performance. In *Howell* v. *Coupland* (1874), L.R. 9, Q.B. 462, affd. 1 Q.B.D. 258, where it was held (applying *Taylor* v. *Caldwell*) that the seller of future crops to be grown on specific land was discharged from his obligation when the crops failed to materialise, it was pointed out by the Court that on the facts of the case "no skill, care, or diligence" could have prevented the failure, and that the result would have been different if the failure had occurred through the seller's "default" (L.R. 9, Q.B. at 465). So strong is the general rule that it is applied to the construction of a *force majeure* clause. (See *Lebeaupin* v. *Richard Crispin & Co.*, [1920] 2 K.B. 714, where McCardie held that "a man cannot rely on his own act, or negligence, or omission, or default, as '*force majeure*'." See also *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.*, [1934] A.C. 538). Another striking case is *Re Arthur's Estate* (1880), 14 Ch.D. 603. Here a marriage settlement was entered into in August, 1873, in which the husband covenanted to insure his life "on or before the 2nd of July 1875." The husband thus had nearly two years

in which to insure within the terms of the covenant, but he took no steps to do so until the 1st of July, 1875, shortly before which his health, which had previously been good, became so bad that he was unable to effect an insurance. Jessel, M.R., held that the husband was not discharged from his obligation. "It does appear to me clear," he said, "that he cannot avail himself of that negligence or omission on his part to take any steps towards the performance of his covenant till a day or two before the expiration of the two years, to say that there has been no breach of covenant."

As has been said, it was not necessary for the House of Lords to pronounce finally upon this question, because they were able to decide the case on another ground. Assuming that if the event were caused by the negligence of their owners or their servants it would not constitute a defence to the owners, upon whom was the burden of proving how the event was caused? On this it was held by the House of Lords, unanimously reversing a unanimous Court of Appeal, and restoring the decision of the trial judge, that the burden was upon the charterers. Consequently, there being no certainty how the explosion occurred, the decision had to pass for the owners. This view was supported by the general principle: *ei incumbit probatio qui dicit, non qui negat*, and also by every consideration of policy. To expect the defendant to prove a negative would be in many cases to deprive him of the protection of the law relating to impossibility of performance when in truth he ought to have that protection.

In addition to this express decision, a number of other opinions on the general law of impossibility of performance may be sifted from the speeches.

To what extent is impossibility a defence in an action for breach of contract? Both Viscount Simon (at p. 171) and Lord Russell (at p. 180) maintained the general rule, subject to exceptions, that it is not a defence. Lord Porter, however, expounded the law more precisely when he said: "The true principle seems to be, not that all contracts must *prima facie* be performed whether performance be possible or not, but that there are some contracts absolute in their nature where the promisor warrants the possibility of performance. These he is bound to perform in any event or to pay damages. There are other cases, however, where the promisor is only obliged to perform if he can. In a contract for personal performance where he dies, or in certain other cases where the subject-matter of the contract is destroyed, he cannot implement his promise. In such cases, then, he is excused unless he be in fault . . . Where the promisor makes an absolute promise, he takes the risk of his ability to fulfil his contract, and he must do so or pay damages. No question of frustration does or can arise. Whatever occurs, the promisor is bound. The very fact, however, that in certain cases impossibility of performance is an excuse shows that in those cases there is no absolute promise. It is conditional upon something—namely, the possibility of performance" (pp. 198–9).

This is an important distinction, and it is one that has received insufficient attention in statements of the law of impossibility of performance. With the greatest respect, however, it may be doubted whether the exact distinction is quite as Lord Porter has stated it. It will be seen that Lord Porter divides contracts into two classes: (1) those in which the obligation is to use due diligence to perform, and (2) those in which the obligation is absolute, *i.e.* without qualification. But it seems that the present rules of English law can only be expressed by dividing contracts into three, as follows. (1) Those in which the obligation is to use due diligence to perform (*e.g.* the obligation of a railway company to use care in the carriage of

passengers).[4] (2) Those in which the obligation is commonly said to be "absolute" (i.e. to amount to an "absolute" assurance that the act shall be done), but where, nevertheless, the law reads into this "absolute" contract certain exceptions. The word "absolute" therefore means in this context not "without exception" but "absolute apart from certain specific exceptions." The exceptions are: (*a*) the rule relating to contracts that depend on the availability of a given person; (*b*) the rule relating to contracts that depend on the availability of a given corporeal thing (*Taylor* v. *Caldwell*); (*c*) certain cases of subsequent change in the law; and (*d*) impossibility caused by the fault of the promisee. In addition it must be remembered that discharge may occur through (*e*) the failure of a condition precedent that is either expressed in the contract or implied in it as a matter of *genuine* interpretation of the intent of the parties, in accordance with the ordinary canons of construction. These five cases cover the discharge of so-called "absolute" contracts for physical impossibility. There are also two grounds of discharge where the obligation does not become physically impossible, namely discharge (*f*) for frustration (*stricto sensu*), *i.e.* inordinate delay resulting from temporary impossibility for which the promisor is excused in law, and (*g*) for failure of consideration, where performance on the other side fails to take place, or the expected return for the promise fails to materialise, either through impossibility or for some other reason. (3) In the third category are those contracts where the obligation is in truth "absolute"—where by its terms or by reason of their inherent limitations all the above exceptions are ruled out. An example would be the obligation to pay for goods or land bought where the property has already passed (so that there can be no question of a failure of consideration). For the purpose of expounding the law there is no need to treat this type of contract separately from type (2); the vital distinction is between type (1) on the one hand and types (2) and (3) on the other.

Of the above exceptions to "absolute" undertakings of the second category, (*a*) and (*b*) were recognised in the instant case by Lord Russell (p. 180); (*a*), (*b*), and (*c*) were specifically recognised by Viscount Maugham, and he added the further head: "Where circumstances arise which make the performance of the contract impossible in the manner and at the time contemplated" (p. 177). It is not clear what the noble lord meant by this. Read literally it is so wide that the other cases of discharge are not worth stating; in fact it is so wide that it amounts to a statement that impossibility is a general defence in the English law of contract, which, with all respect, is not true. The statement might be construed as a reference to the principle of *Krell v. Henry*, [1903] 2 K.B. 740, were it not that that principle is referred to shortly afterwards as a distinct topic. Perhaps it is meant to express the law relating to inordinate delay (exception (*f*), above), but if so it might with advantage have been more precisely drafted.

There is little or no recognition in the speeches of the point of view contended for in a paper recently contributed to this REVIEW,[5] that one-half of the cases usually treated as cases of impossibility are really cases of failure of consideration. In the first place, both Lord Wright (at pp. 184–5) and Lord Porter (at pp. 194–5) treated *Krell* v. *Henry* as extending the rule in *Taylor* v. *Caldwell*, and establishing that where the object contemplated by both parties has become impossible the contract is discharged.

[4] See in more detail Williams in McElroy, *op. cit.*, pp. xxvii, 6–7.
[5] "The Coronation Cases, I" (1941), 4 MODERN LAW REVIEW 241.

In the second place, almost all the noble and learned lords assumed that there is a single doctrine of "frustration" which, when it operates, discharges *both* parties.[6] Although both these opinions have become almost traditional, it is submitted that they need to be considered with care before being finally adopted into the law. As regards the second opinion, the attention of His Majesty's judges is earnestly invited to the proposition that where A contracts to do an act in return for a money consideration by B, and A's act becomes impossible, the discharge of the parties, if it takes place, does not rest on one principle of law, but rests on two entirely distinct principles. The discharge of A rests upon the law of impossibility of performance, while that of B rests upon the law of failure of consideration. Admittedly the distinction is somewhat academic on facts like those in *Taylor* v. *Caldwell*, where the two principles concur to discharge both parties[7]; but sometimes the principles operate with different results for the two parties, and then the distinction between them becomes apparent. To take a simple illustration, suppose that A grants a *lease* (not a licence) to B in respect of his music-hall as from a future date, and the music-hall is destroyed by fire before the date arrives. In such a case, although the lessor is discharged from his obligation to provide the music-hall by virtue of the decision in *Taylor* v. *Caldwell*, the lessee is not discharged from his obligation to pay the rent, because this is an exception to the normal principle of failure of consideration.[8] Again, where A agrees to sell specific goods to B, and the goods are destroyed after the property in them has passed but before delivery, A is discharged by the operation of *Taylor* v. *Caldwell*, but B is not discharged, because, the property having passed, there is no failure of consideration.[9] These illustrations may show the fallacy of the view that one party cannot be discharged in a case of impossibility of performance without the other being discharged also. The fallacy lies at the bottom of the received opinion that in a case like *Krell* v. *Henry* both parties were discharged by the cancellation of the procession. It is submitted that in truth, though the hirer of the rooms could properly be

[6] See Viscount Simon at p. 171, Viscount Maugham at pp. 175, 176–7, 178, Lord Wright at pp. 185, 187–8, and Lord Porter at p. 196. The speech of Lord Russell does not touch the question.

For a criticism of the "automatic" theory of frustration (adopted in these speeches), see McElroy, *op. cit.*, pp. 221–31, and the editorial addition at pp. 96–8.

[7] But note that the letter would have been bound, at the option of the hirer, as to the pleasure gardens that remained: see Williams in McElroy, *op. cit.*, p. 100.

[8] *Ante*, Vol. IV, pp. 256–60.

[9] This case is not provided for in s. 7 of the Sale of Goods Act, 1893, and the reason why it was left out is instructive. The draughtsman was trying to express the decision in *Taylor* v. *Caldwell* as it applied to the law of sale of goods, but he laboured under the delusion that where the principle of this decision applied it operated to discharge both parties. He saw that the buyer could not be discharged if the property had passed at the time of the destruction of the goods, and thus he limited the section to the case where the property had not passed. The result is a *casus omissus* where the property has passed. What the draughtsman should have done is clear: he should have stated the principle of *Taylor* v. *Caldwell* in s. 7 (discharge of the seller), and the principle of failure of consideration in s. 20 (discharge of the buyer).

Another *casus omissus* is the case where the goods are damaged but not destroyed, and the buyer is willing to take them as they stand and make the full payment. Clearly he is entitled to do so, and it follows that the contract as a whole is *not* automatically avoided by the occurrence of the damage.

The harmful consequence of s. 7 outside the law of sale of goods is that it has fostered the automatic theory of frustration and failure of consideration. *Cp.* the reference made to it in this context by Lord Wright in the instant case (pp. 187–8).

regarded as discharged by the operation of the principle of failure of consideration, had the hirer elected to retain and pay for the rooms notwithstanding the lack of a procession the letter would have been bound. On facts like those in *Krell* v. *Henry* this is again academic; but in other cases it may be vitally important.[10]

G. L. W.

It was a disappointment to many lawyers that the House did not tackle the interesting and much debated problem which was discussed in the lower courts of whether the doctrine of frustration is properly based on an implied term in the contract, or is to be derived from a rule of law operating to dissolve certain types of contract when they become impossible of performance. Lord Simon devotes a somewhat perfunctory aside to the matter in which he suggests that it is of no legal consequence, and inclines to a conservative view in favour of *Taylor* v. *Caldwell*. He advances two arguments in support of this opinion, the one that the parties may expressly bind themselves to the performance, and the other that impossibility does not of itself induce frustration.[11] This is with respect a somewhat cursory treatment of the subject, for the parties may always contract out of the application of any rule of law unless it is contrary to public policy to permit them to do so, while it is common ground that mere impossibility does not of itself bring a contract to an end; the whole object of the discussion being to find some juristic principle which will enable a court to decide whether the contract has in fact been frustrated.

Lord Maugham (*ibid.* p. 175) also stresses the point that it is the consequences of the doctrine which are important, and these he says are the same whichever basis be correct. He seems to regard Lord Sumner's speech in *Hirji Mulji* v. *Cheong Yue S.S. Co.*, [1926] A.C. 497, as being the most authoritative exposition of the subject; and Lord Sumner, of course, took the view that frustration is quite independent of the intention of the parties; it is really a legal "device by which the rules as to absolute contracts are reconciled with a special exception which justice demands."

Lord Russell of Killowen does not discuss the matter at all, and Lord Wright's refusal to indicate a view (p. 186) is the more disappointing as his discussion of the subject in a non-judicial forum[12] shows that he has devoted thought to the matter in the past. Here he takes the line "whatever explanation is adopted cannot affect the decision of this, or, so far as I can see, of any case."

Lord Porter adopted a somewhat novel outlook, and departed radically from what has generally been regarded as the common law rule, viz. that "all contracts must *prima facie* be performed whether performance be possible or not," finding the "true principle" in the presence or absence of an implied warranty of performance. "There are some contracts absolute in their nature where the promisor warrants the possibility of performance. . . . There are other cases where the promisor is only obliged to perform if he can." With respect to the learned law lord this

[10] Thus it is submitted that the decision in *Tamplin* v. *Anglo-Mexican S.S. Co.*, [1916] 2 A.C. 397, can be justified only on the ground that the charterer in that case did not choose to rely on the doctrine of failure of consideration. See *per* Lord Dunedin in *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. at 129, and McElroy, *op. cit.*, pp. 106, 156–7.

[11] [1941] 2 All E.R. 171.

[12] *Legal Essays and Addresses*, p. 254 ff.

only introduces a new element of confusion. When are we to imply the warranty? Does it depend on a presumed intention, or is it to be implied as a matter of law? We are no nearer the solution, and have added a further mile to the difficult and muddy road.

The learned law lords think that the answer is of no practical consequence. A purely academic lawyer would no doubt reply that the solution of such a fascinating legal problem should be valuable for its own sake. I do not find this a compelling argument, though intellectually it attracts me. I think, however, that the social implications of the answer are quite fundamental, because the theory involved in *Taylor* v. *Caldwell* is really that of *laissez-faire*—the adding of a term to the contract which the parties would have inserted had they considered the matter—while the theory propounded by Lord Haldane in *Tamplin's case*, and apparently accepted by Lord Sumner in *Hirji Mulji's case*, is that of the Court's right to intervene when justice, interpreted through the economic needs of the situation, requires it to do so. In a number of passages in the book to which I have referred Lord Wright seemed to have taken up this modernistic position. It is disappointing to see him apparently in retreat.

R. S. T. C.

Statutory and Common Law Duties

The decision of the House of Lords in *East Suffolk Rivers Catchment Board* v. *Kent and Another* (1940), 4 All E.R. 257, is of great juristic as well as social importance. In substance it means that the numerous bodies endowed with public functions and authority will be on a different footing from private persons or bodies, insofar as they have statutory power but not a specific duty to execute certain work. They will be immune from civil liability if they execute such work negligently, and while this legal position might encourage such authorities to overcome bureaucratic hesitation in executing work of urgency and importance, it might, on the other hand, encourage a certain amount of carelessness and further weaken the rule of law so much praised by Dicey, which is supposed to place everyone, private subject and public authority alike, under the same obligations in common law. The steady increase of economic and social activities of the State or other public authorities in spheres formerly within the purview of private law, will make a complete reconsideration of the spheres of private and public law inevitable. In a liberal economy, private law and a corresponding legal mentality prevails, while, in an economy strongly dependent on State activity, public law predominates and produces a different approach to legal problems. Great Britain is in a state of transition, greatly accelerated by the war, but the law and judicial interpretation has hardly begun to adjust itself to the changing social position.

The respondents were the owners of land protected by a wall from inundation by a tidal river. Owing to a strong spring flood tide, the wall collapsed and caused a wide breach which the appellants attempted to repair, by an incorrect method and with an insufficient number of men. The appellant had the power, but not duty, to repair the breach. The breach was caused by an act of Nature, and it was found as a fact that the negligent action of the appellants had not caused damage greater than that which would have been caused by Nature without any interference from them. On the other hand, the negligent manner of repairing the breach resulted in a closing of the gap after 164 days, whereas, with the exercise of reasonable skill, it could have been closed and the flood arrested in

fourteen days. The difference caused the marsh pasture to be correspondingly longer covered by salt water, and thus unusable.

The House of Lords decided (Lord Atkin dissenting) against the majority of the Court of Appeal, that, in these circumstances, an action for damages against the Catchment Board failed. Despite Lord Blackburn's statement in *Geddis* v. *Bann Reservoir Proprietors* (1878), 3 A.C. 430, that "an action does lie for doing that which the legislature has authorised if it be done negligently," the majority in the present case held that this did not mean that such an action would lie in the absence of proof that the defendant's negligence caused damage. There was no damage here since the respondents were no worse off than if the appellants had not intervened at all. Lord Justice du Parcq, in the Court of Appeal, gave a reason of policy for this decision, which Lord Simon approved. Where Parliament had left it to a public authority to decide which of its powers and to what extent it should exercise, this might raise: "a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of efficiency and thrift."

Lord Atkin's dissenting judgment is of great importance, not only because of its different approach to the comparative position of public bodies and private persons in regard to activities which affect the public, but also because of its clear and illuminating exposition of the difference between statutory and common law duties. Lord Atkin strongly criticised the absence of such a distinction in the judgments of the majority. A statutory duty was primarily a duty owed to the State, but it might also give protection to a citizen or a class of citizens, in which case an action for damages would lie on behalf of such citizens. This rather differs from the statement in Salmond, based on Lord Justice Vaughan Williams' judgment in *Groves* v. *Wimborne* (1898), 2 Q.B. 415, that "*prima facie* a statute which creates a duty creates at the same time a correlative right vested in the individuals for whose protection and benefit the duty has been imposed"; but this is a difference in emphasis which will make little difference in practice. A further differentiation briefly referred to by Lord Atkin is that sometimes the damages for breach of statutory duty do not, whereas in other cases they do, depend on negligence. This, of course, leads us to the question of the present validity of the distinction between strict duty and negligence, a very doubtful question as illustrated by the *Lochgelly* case (1934, A.C.1) and discussed in previous contributions to this REVIEW (1 M.L.R., 37 *ssq.*; 3 M.L.R., 309; 4 M.L.R., 139 *ssq.*; 4 M.L.R., 308).

Quite distinct from these various types of statutory duties, Lord Atkin maintained, every person, whether discharging a public duty or not, was under a common law obligation to some persons, in some circumstances, to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care. A builder, repairing a shopkeeper's roof negligently, so as to let rain come in longer than necessary, would undoubtedly be liable, whether he had an obligation to start or complete the work, or not. In the same way, a public authority, whether doing an act which it was merely empowered to do, or which it was its duty to do, must in doing the act do it without negligence. Lord Atkin strongly emphasised the public policy aspect of the matter, in saying—

> "I cannot imagine this House affording its support to a proposition so opposed to public interests where there are so many public bodies exercising statutory powers and employing public money on it."

This, however, is precisely what the House did. It reveals a highly important issue of public policy: whether to subject the increasing number of public authorities entrusted with functions affecting the economic position of individuals, singly or in groups, to the same rule of law, in pursuance of the tradition of English legal development, or whether to develop a far-reaching distinction between administrative discretion and private duty. The decision of the majority means nothing les than a partial recognition of the specific character of *Droit Adminstratif*. Its logical development would either lead to a system of administrative law and tribunals, or to something like the theory of the Soviet Russian jurist Pashukanis, according to whom in a socialised economy the law, being characteristically private law, disappears in favour of administrative discretion exercised for the benefit of the community. This, of course, means looking into the future, but it is one of the paramount juristic problems before us.

From Lord Atkin's statement quoted above, restating the principle in *Donoghue* v. *Stevenson*, but adding the words "in some circumstances," Mr. Landon has concluded (57 L.Q.R. 183) that the pernicious principle of that decision, introduced into English law by "an alien majority" has been reversed, for Lord Atkin's words meant that the general and sweeping duty formulated by that majority had been given up for the previous position, when there were only duties in some cases, namely, when "the wisdom of our forefathers" had so decided. It is unlikely that Lord Atkin meant to revise the principle of *Donoghue* v. *Stevenson*, and equally unlikely that a dictum in a dissenting judgment could be quoted to overrule a principle stated in a majority decision of the House of Lords, binding on the House.

W. FRIEDMANN.

Libel—Judge sitting without Jury—Whether bound to Award Exemplary Damages

Rook v. *Fairrie*, [1941] 1 K.B. 507, may prove to be a turning-point in the practice relating to the award of damages in libel actions. It is well known that in the days when such actions could not be tried by a judge alone, the only way in which the jury could in their verdict mark their high esteem of the plaintiff and their sense of the iniquity of the defendant was by fixing the damages far in excess of anything that the plaintiff had suffered. The award of damages on this scale, however, has been a standing temptation to some people to bring "gold-digging" libel actions, and has at the same time operated to induce prudent defendants, who in reality have a good defence to the claim, to pay a moderate sum in settlement lest some miscarriage of justice may take place at the trial.

These are trite observations, but they need to be borne in mind if the decision in the present case is to be assessed at its proper value. The question arose as a result of the modern tendency to dispense with juries in civil cases. No longer is it usual for the machinery of the civil law to end (in the words of Lord Brougham) "simply in bringing twelve good men into a box." Nowadays it commonly ends even more simply, in a trial before a judge sitting without a jury. Since the outbreak of the present war the practice has been extended to libel cases by the Administration of Justice (Emergency Provisions) Act, 1939, s. 8. Acting under this provision Atkinson, J., in the instant case had decided against the defendant in what appears to have been a case of a particularly flagrant

libel, but in his judgment, in which he severely castigated the defendant, he refused to award the plaintiff more than £550 damages. He felt himself entitled to award lower damages than a jury would have done because, as Sir Wilfrid Greene, M.R., put it in the Court of Appeal, he was able to express (and had expressed) in words what a jury could express only in figures. On appeal the Court of Appeal refused to interfere with the award, and expressly approved the principles on which Atkinson, J., had proceeded in assessing damages. Although the learned Master of the Rolls indicated that if he had been the trial judge he would have awarded more, MacKinnon, L.J., was unqualified in his approval of the judgment appealed from. It may not be too much to hope, therefore, that the case may initiate an altogether new scale of damages in libel actions, and that it may thus point a way of escape from some of the troubles that have hitherto beset the administration of this branch of the law.

G L. W.

Breach of Statutory Duty—Unfair Trade Competition

It is to be regretted that the argument for the plaintiffs in *London Armoury Co., Ltd.* v. *Ever Ready Co., Ltd.*, [1941] 1 K.B. 742, was confined to the question of breach of statutory duty, and did not (so far as appears) make a serious effort to base the claim upon unfair trade competition. The facts were that both the plaintiffs and the defendants were importers of electric torch batteries for sale in the United Kingdom. By the Merchandise Marks Act, 1926, such batteries were required, under penalty of a fine, to bear an indication of their place of origin. The plaintiffs, when selling batteries, complied with the statute but the defendants did not. The result was, in the words of the statement of claim, that "the defendants have been able to sell and have sold such imported goods as aforesaid as and for British-made goods and at the prices applying to British-made goods, in consequence whereof the plaintiffs have been subjected to unfair competition and have suffered damage." Notwithstanding this reference in the pleading to unfair competition, Tucker, J., assumed that the action was brought solely for the tort of breach of a statutory duty, and he had little difficulty in holding that put on that ground the action failed. The design of the Merchandise Marks Act was to protect home manufactures, not foreign manufactures; so far from being intended to protect importers of foreign goods it was aimed against them. And it is well settled that where the interest invaded is not the one that the enactment intended to protect no action lies for breach of statutory duty (*Gorris* v. *Scott* (1874), L.R. 9 Ex. 125; and see the rule clearly stated in *Restatement, Torts*, s. 286).

But it is submitted that this ought not to have been regarded as the end of the case. What the plaintiffs were really complaining about was not that the defendants were breaking a statutory duty owed to the plaintiffs, but that they were indulging in unfair trade competition by ignoring statutory restrictions to which the plaintiffs had submitted. On a close analysis it will be seen that this was not a question of breach of statutory duty, for the object of the statute in imposing the restrictions was irrelevant. The fact was that the statutory restrictions were there, and that whatever their purpose the plaintiffs were complying with them whereas the defendants were not. With respect it is submitted that the plaintiffs' claim on this score could not properly be dismissed simply by reference to the authorities on breach of statutory duty.

The question remains, therefore, whether the defendants could have

been regarded as having committed a tort of unfair trade competition. Hitherto the tort of unfair competition had been recognised only in one of its possible applications, namely, "passing off"[1]; but it is submitted that there is nothing in the authorities to prevent a courageous judge from extending the underlying idea to cover the facts of the instant case. The chief obstacle is the decision in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25, where there are certain dicta to the effect that it is impossible for a Court to decide between fairness and unfairness in trade competition. But it should be noted that the speeches in the House of Lords emphasise that the defendants in that case had not acted illegally, and indeed had done little more than to reduce freights to persons who would deal exclusively with them. In the instant case the defendants had acted illegally. However difficult it may be in some cases to decide between the fairness and unfairness of competition, it is not difficult to say that a trader who ignores statutory restrictions with which his competitors are complying is guilty of unfair competition.

Another case that may be cited in order to be distinguished is *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347, where the House of Lords held that a statutory offence should be remedied in the way provided for in the statute (viz., summary proceedings with a maximum fine of £20) and not by an action for an injunction (interdict) at the suit of private persons. "I will not dwell," said Lord Herschell, L.C., at p. 362, "upon the grave inconveniences which would result from sanctioning a procedure of that description. The mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, and the law would, I believe, contrary to their intention, be most seriously modified if it were held that the party committing the breach of that which for the first time is made an offence were to subject himself by so doing to proceedings of this description which might result in a committal to prison." This is good sense, but it must be noted that the case with reference to which the words were spoken was not one of unfair competition. The offence committed by the respondent was simply that he practised as a patent agent without being registered as required by law; and the only advantage that he obtained through not being registered was that he did not have to pay a small annual fee. It was not a case in which the appellants were unfairly handicapped as a result of their compliance with a statute which the respondent was ignoring. Moreover, it was not a case in which the statutory remedy had been tried and failed. Since the decision in *Lockwood's* case the rule has been developed that (at least where a person persists in breaking an Act of Parliament notwithstanding the infliction of the punishment prescribed by the Act) a relator action may be brought in the name of the Attorney-General for the purpose of obtaining an injunction: *Attorney-General* v. *Sharp*, [1931] 1 Ch. 121; *Attorney-General* v. *Premier Line, Ltd.*, [1932] 1 Ch. 303. In the latter of these cases Eve, J., said, *obiter*, that no action could have been brought except in the name of the Attorney-General, and this was used by Tucker, J., in the instant case to reinforce his decision. But there is this vital difference between the two cases, that *Attorney-General* v. *Premier Line, Ltd.*, did not involve the element of unfair competition. The offence committed by the defendants in that case consisted in the running of a motor-coach service without a licence under the Road

[1] See Grismore, "Are Unfair Methods of Competition Actionable?" (1935) 33 Michigan Law Rev. 321; Chafee, "Unfair Competition" (1940) 53 Harvard Law Rev. 1289; Winfield, Text Book, § 173

Traffic Act. The relators, who were other motor-coach owners holding licences to operate on the same route, were not handicapped in their trade competition by the defendants' failure to get a licence; in fact, the last thing that the relators wanted was that the defendants should succeed in getting a licence. What the relators were trying to stop was not unfair competition but competition *per se*, and that they could have done (by an action in their own names) only if they could have shown that the provisions of the Road Traffic Act were intended to protect their interests. But it does not at all follow that the same restriction exists in the action for unfair competion.

To sum up, one cannot help feeling that in the case under review a golden opportunity has been missed for showing that the Courts are not completely helpless in matters of unfair competition. The result of the decision as it stands is that the defendants were allowed not only to make a profit out of illegality, but to make that profit at the expense of their law-abiding rivals. If there is, as some contend, a general principle of liability in tort, one would have been glad to see it invoked to achieve a different result from this.

G. L. W.

Meaning of Domestic Service

The case of *Cameron* v. *Royal Ophthalmic Hospital* (1941), 57 T.L.R. 195, is rather like that of *Pratt* v. *Cook* (annotated in 4 Mod. L. Rev. 56), which resulted in the Truck Act of 1940.

The Truck Act of 1940 restrains any proceedings being brought in respect of agreements made before the Act was passed, based on the earlier and mistaken interpretation of the Acts.

Mr. Cameron, a stoker in the employ of the Royal Ophthalmic Hospital, claimed £344 15s. for board, £295 10s. for lodging and £29 11s. for laundry for 394 weeks, less holiday allowance, which sums he alleged had not been paid to him as wages in current coin of the Realm. He later abandoned the claim for board as the Truck Act, 1940, rendered this unobtainable.

Lord Justice du Parcq stated in his judgment that if Mr. Cameron was not a domestic servant (and thus outside the scope of the Truck Acts, which do not apply to domestic servants) he was clearly entitled to succeed in his claim, in view of the House of Lords decision in *Pratt* v. *Cook*.

At first sight the occupation of a stoker is not one which would normally be associated with domestic service. The judge, however, considered that for the purposes of the Truck Acts, a domestic servant is one whose main function is to work in a domestic establishment for the purpose of its upkeep and the convenience of its members. On this interpretation a hospital is to be considered a domestic establishment; "indeed some hospitals are commonly referred to as homes." Were the plaintiff's duties such as to make him a domestic servant? The judge held that although Mr. Cameron sometimes did the work of a mechanic and performed other tasks which a domestic servant would not ordinarily have been called upon or able to do, yet the general nature of his employment was of a domestic nature in the true meaning of the phrase. His claim was accordingly dismissed.

The case is interesting as it is clear that on this interpretation the place and circumstances of a person's work rather than or at least in addition to the actual work he does may be the determining factors in deciding whether he should be included in a particular category of employment.

R. C. Chambers.

Failure to Fence Dangerous Machinery a Continuing Offence

In the case of *Rowley* v. *T. A. Everton & Sons, Ltd.* (1940), 57 T.L.R. 86, an appeal was made by H.M. Inspector of Mines from the decision of the Stourport-on-Severn Justices. The defendants were owners of a quarry, which it was alleged they had failed securely to fence as required by the Quarries General Regulations (1938) made under the Metalliferous Mines Act (1872). The machinery had been installed at various dates between November, 1938, and August, 1939, by which latter date it was all in operation.

The Metalliferous Mines Act contains the following provision: "Any complaint or information made or laid in pursuance of this Act shall be made or laid within three months from the time when the matter of such complaint or information respectively arose." The defendants maintained that as the machinery was all in working order by 29th August, 1939, the matter of the information had arisen then, and that as the actual information had not been laid till January, 1940, more than the necessary three months had elapsed. The Local Justices agreed with this remarkable view and dismissed the case.

In the King's Bench Division it was held that this curious defence was not admissible. The failure to fence dangerous machinery is a continuing offence and it cannot be pleaded that because the offence had been committed over a longer period than three months, it is statute barred and therefore no offence at all. It is obvious that an exceedingly dangerous position would arise if such were the law.

It was held that the cases upon which the defendants relied—cases under the Building Acts where proceedings were barred by lapse of time under the Summary Jurisdiction Act, 1848—contained nothing to affect the Court's views in the present case. The appeal was accordingly allowed and the case remitted to the magistrates to hear and determine.

R. C. Chambers.

Company—"Controlling Interest In"

The device of incorporation—in the form of a private company—has become notorious in the realm of sur-tax evasion, and has resulted in a code of remedial legislation which, for almost unintelligible complexity, it would be difficult to find an equal in the statute book. This same device, but in a different form, may be used to evade liability to special taxes, such as the National Defence Contribution and the Excess Profits Tax, which charge only profits arising from carrying on a business and not the *total income* of an individual as in the case of sur-tax. These business profits may, in the case of a private company, be reduced to vanishing point by the payment away of excessive and extravagant remuneration to the directors. To counter this, special provisions have been introduced restricting or nullifying the charge for directors' remuneration, etc., in the case of companies whereof "the directors have a controlling interest" (see, as regards National Defence Contribution, Rules 4 and 11, Seventh Schedule, Finance Act, 1937, and as respects Excess Profits Tax, Section 33 (5), Finance Act, 1940). It had been held in *B. W. Noble, Ltd.* v. *Commissioners of Inland Revenue* (1926), 12 Tax Cas. 926—decided under similar provisions relating to the Corporation Profits Tax imposed by the Finance Act, 1920—that a bare majority of the actual vote-carrying shares was sufficient to give a director a controlling interest in a company.

In *Commissioners of Inland Revenue* v. *F. A. Clark, Ltd.* (1941), 192 L.T. 131, the question whether the expression "controlling interest" applied to the "indirect" control of a company as it did to the "direct" control fell to be decided. The majority of the shares in the respondent company were held by another company which was under the *direct* control (*cf. B. W. Noble, Ltd.*, case above) of the two directors—could the directors of the former company be said to have a "controlling interest" in it within the meaning of Rules 4 and 11 referred to above? It was argued that the word "interest" meant a legal or equitable interest of a proprietary nature in the shares of the company sought to be taxed, and clearly the directors of the respondent company had no such *direct* interest. Lawrence, J., rejected this contention and accepted the view put forward by the Revenue, viz. that the term "interest" was one of wide connotation (*Skinner* v. *Att. Gen.*, [1940] A.C. 350, 357–8), and in any case must be interpreted together with the word "controlling" which was not a term of art; these two words—"controlling interest"—in their ordinary meaning covered both "direct" and "indirect" control of a company.

Another form of legal avoidance of tax—this time by Big Business—is the incorporation abroad of subsidiary companies, care being taken to ensure that the business activities are controlled by local directors without any overt interference from this country; in such a case the foreign company is neither resident in this country nor carrying on a trade there, so that its profits are not subject to British taxation (see *De Beers Consolidated Mines, Ltd.* v. *Howe*, [1906] A.C. 495, and *Egyptian Delta Land and Investment Trust, Ltd.* v. *Todd*, [1929] A.C. 1, as to the connexion between "control" and "residence"). Rule 7 (ii), Seventh Schedule, Finance Act, 1937, provides that where a company resident in this country has a "controlling" interest in foreign companies not resident here, any dividends received from these companies have to be included in its trade profits assessable to the National Defence Contribution. In *British-American Tobacco Co., Ltd.* v. *Inland Revenue* (1941), 2 All E.R.651, which was decided together with *F. A. Clark & Son, Ltd.*, case referred to above, a majority of the vote-carrying shares of foreign companies resident abroad was owned either directly by the appellants or indirectly by them through another company in which they held more than half of the voting power. The articles of association of these foreign companies required a three-quarters majority of votes for a winding up but otherwise a bare majority sufficed. A similar argument to that in *Clark's* case, viz. that the "interest" must be of a direct proprietary nature was put forward—and rejected for the same reasons. In addition it was contended that in the special circumstances of this case a three-quarters majority was necessary for the interest to be a "controlling" one, but this was rejected in view of the decision in *B. W. Noble, Ltd.* v. *Inland Revenue* (1926), 12 Tax. Cas. 926, that a bare majority of votes was sufficient.

It is interesting to contrast the much more stringently drawn provisions of the Acts dealing with the liability of interconnected companies to Excess Profits Tax (see section 28 and Fifth Schedule, Finance Act, 1940). In order for the liability of a principal company and its subsidiary companies —wherever resident and whether carrying on trade or not in this country— to be dealt with as one unit for the purposes of this tax, the principal company must hold, whether directly or through other companies or partly directly and partly through other companies, at least 90 per cent of the ordinary shareholding of the subsidiary company—(section 17 (6),

Finance (No. 2) Act, 1939). Once this condition prevails the whole of the profits of the foreign company come within the purview of liability to Excess Profits Tax and not merely the dividends, as for the National Defence Contribution.

A. FARNSWORTH.

REVIEWS

SOCIAL ASPECTS OF CRIME. By DR. HERMANN MANNHEIM.

This book revives one's despair, not because it is anything less than a good and thorough book written by a fine and scholarly man—one of Hitler's best exports—but because it displays, all the more convincingly by its very depth and erudition, the miserable inefficiency with which even the best efforts to understand and solve the problems of present-day crime are attended. Dr. Mannheim has gathered together all the available material, as little unreliable as may be, and has gone a long way towards understanding its real purport—he does not need to entertain the fear he expresses that "through the eyes of a foreigner" he sees less clearly than would a native Englishman of equal attainments—but one obtains an almost overwhelming conviction, both from his own warnings as to the limits and imperfections of statistical material and from one's reflexions on the facts he presents, that both the enlightened official and the unofficial reformer are reduced to basing themselves on what is no better than guess-work in forming their conclusions and policies. When it is realised that on the basis of this material men and women are put to untold suffering in the hope of rendering them socially more useful, little confidence can be felt that the whole of our efforts at reform are not doing more harm than good; one is reminded of a well-meaning but inadequately informed fire-brigade pumping into a burning building in the middle of a town thousands of gallons of a pale liquid which is later discovered to have been kerosene.

Nevertheless, we cannot accept defeat, and pending the arrival of the day when life is secure and happy, when men ready to work under reasonable conditions are treated as assets and not as liabilities, Dr. Mannheim's researches are as much help as anything can be.

I can well imagine that his principal difficulty in his prolonged and laborious task was to know what to leave out; it is sad that, even on the imperfect material now available, he could not give us the "final chapter at present unwritten," containing his conclusions and some hint of his views as to the future, and the fuller treatment of the problem of recidivism which he withholds from the last chapter he has actually written. Perhaps he will essay those tasks in the not remote future, when fundamental changes, of whose onset he purports to remain discreetly unaware, will have changed and enlightened the scene and the problems.

There are many minor points on which one might disagree with Dr. Mannheim's diagnosis, and one or two points where he seems to be in mere error—for example, what is probably no more than a misunderstanding as to the lawyer's technical meaning of "Sessions" makes him appear to suggest at p. 95 that death sentences could be passed by City or County Quarter Sessions, and some of the statistical tables are not very clear; but on the whole the book is singularly free from minor blemishes.

Every book should, I suppose, contain one outstanding example of meiosis; Dr. Mannheim's best masterpiece of understatement is an assertion that there exists a "danger that betting, as now regulated by law, may lead to attempts to bribe police officers."

The book is well got up, and everyone concerned deserves to be congratulated on having persevered with the task and brought it out.

D. N. PRITT.

Mr. Pritt has given a personal impression of Dr. Mannheim's book, as he read it against the background of international strife and chaos which has probably put back the clock of penal reform for many years. Some rather more detailed description and appreciation of its contents may prove useful to possible readers.

In the first place there can be no doubt that Dr. Mannheim's researches will prove a starting point for future serious study of the social aspects of crime in this country. With exceptions which could be counted on the fingers of the hands the great volume of writing about criminology and penology during the past twenty years has been romantic and subjective. Here is a scientific and objective survey, the obvious value of which is not depreciated by the fact that it is in a number of respects disappointing. Its disappointing qualities themselves, however, would in a community which had any real conscience or indeed intelligence about crime themselves prove of tremendous value, because they demonstrate so clearly that the apparatus for really first-class investigation in this subject is largely non-existent in this country. That the author should have succeeded in producing this much fruit single-handed out of such a desert is a great testimony to his industry, knowledge, and ability.

No branch of the social sciences is more dependent upon statistical surveys than is criminology. In no branch are the statistics so deficient, and, when they exist, so confusing and misleading. It must be heart-breaking to any competent scientific writer to have to base his generalisations upon such an amorphous mass of badly collected material. Part I of this book is devoted to a detailed analysis of the statistical material. We can only express the hope that this searching criticism will in the post-war years be taken to heart at the Home Office, and the necessary reforms inaugurated. The interpretation of criminal statistics must in any event give rise to considerable difficulty, and Dr. Mannheim's observations on this subject in his third chapter, though directed specifically to English criminal statistics, have a permanent value for all students of criminology with whatever sets of statistics they may have to deal. It is in some ways a pity that it was necessary to place this careful statistical study in the forefront of the work, because it furnishes a somewhat forbidding prelude from the point of view of the general reader, who should be advised not to be deterred from proceeding to a perusal of Part II, where he will find the statistical material, in Dr. Mannheim's skilful hands, much less terrifying than he might have anticipated after reading the first chapter.

Part II of the book is taken up with a detailed examination of the interrelation of crime with the following aspects of social life; unemployment and strikes, alcoholism, methods of business administration, gambling, juvenile delinquency, and female delinquency and prostitution. There is also a chapter on recidivism. In treating of these subjects Dr. Mannheim

is chiefly concerned with the causative factors in criminality. He does not limit himself at all rigidly to the period between the wars, and indeed in at least one section, that dealing with street trading and juvenile crime, the main substance of his argument relates to the period before 1914.

No chapter in the whole book is more instructive than that on unemployment as a cause of crime, and none illustrates more appositely the extreme difficulties under which the scientific criminologist works in this country. The statistics are, in so far as they exist at all, extraordinarily difficult to handle, and while in some cities such as Liverpool they seem to establish a close causal connexion, in others such as Birmingham crime appears on the face of it to increase with improved employment. The handling of this intractable material is very able, and should prove instructive to later students who will, it is to be hoped, have more satisfactory statistics at their command.

It is refreshing to read a chapter on Alcoholism which is not influenced by teetotal bias, or propaganda for "the trade." One of the most instructive points brought out by Dr. Mannheim is the complete failure of magistrates to make use of the probation system in connexion with drink addicts.

The chapter on Methods of Business as providers of facilities and temptations to crime is a little vague, and curiously enough omits a discussion of sharepushing, "bucket-shop" keeping, and similar aspects of commercial gambling which have bulked rather prominently in the public eye of recent years. The material for a scientific study of these aspects of crime is extraordinarily hard to come by, and a really satisfactory treatment would probably have to be based on an elaborate investigation of case histories. Much the same considerations apply to gambling, a subject where estimates are notoriously based upon moral reactions to the vice in question. How useful a careful research may be is indicated by a survey of a few newspapers which the author himself made over a period of twelve months, the results of which he sets out in this chapter.

Juvenile delinquency is treated of in two chapters, the first concerned chiefly with employment as an inducing cause of crime, the other with an investigation into the case histories of more than one thousand Borstal boys and girls. These ninety pages are, I think, the most valuable in the book. They open up a tantalising vision of further possible work. They also show how very trite and valueless are the usual generalisations put forward both for and against the Borstal system by sentimentalists and so-called realists (like the magistrate whom Dr. Mannheim dryly quotes at p. 282).

The short chapter on recidivism is really a summary of a comprehensive statistical investigation which Dr. Mannheim made in connexion with a study of a substantial number of case histories, but which lack of space prevented his incorporating in this work. It obviously does not do justice to his researches, and one can only express the hope that he will be enabled before long to publish a separate study of this very important matter.

R. S. T. Chorley.

WHAT'S WRONG WITH INTERNATIONAL LAW?

The question at the head of this article forms the title of a pamphlet by Dr. W. Friedmann, recently published by Watts & Co. (48 pp., price 6d.).

No question could be more pertinent at the present time, when war is raging on a scale and with a violence and cruelty without precedent

and in defiance of all law, and when, as Dr. Friedmann shows, innumerable rules which are set down in textbooks as rules of international law have been and are constantly flouted or ignored by national states.

Dr. Friedmann answers the question with his usual clearness and courage and power of direct thought and terse statement. He shows that international law, as existing hitherto, with no authority to make or enforce it and a very inadequate field covered by its rules, has, under present-day conditions, become wholly ineffective as an instrument of international order. He describes in a vivid and interesting way the great changes that have taken place in the nature and activities of national communities and their social and political structures, and the effect of these changes on international relations and the operation of international law, and shows how primitive and imperfect, as compared with municipal or State law, is the body of rules that now poses as international law, and how little capable it is of guiding the national states of to-day in the paths of peace and justice. "The States," he says, "follow what rules there are by custom, and when they choose to depart from them the ultimate settlement is by war. We may call this law if we like—primitive law, perhaps—as long as we are clear that this is a law of a very imperfect type, a law with which we should feel extremely unsafe in our daily life, a law without a legislator to determine what is law and what has ceased to be law, without law courts to interpret it authoritatively, without a police to enforce it."

He describes how the League of Nations Covenant seemed at first to mark a definite advance towards the development of a proper international authority, but failed because half-way counsels prevailed. "National sovereignty," he says, "was saved by the requisite of unanimity in practically all decisions of importance, and Article 16, which decreed sanctions in case of aggression, refrained from establishing any machinery by which a clear decision, emanating from the League as a superior authority, would compel members to apply sanctions."

By an examination of the existing position in regard to "laws of warfare" and "laws of neutrality" he shows how extensive a breakdown of rules hitherto recognised in these matters has occurred as a result of the war policy and methods of warfare of the Fascist group of States, and the profound changes which have occurred in the social structure and technique of all States.

The pamphlet is a convincing piece of destructive criticism of international law as it now stands, but Dr. Friedmann shows at the end that he has a constructive purpose in view, and is seeking to cut away the dead wood in order to make room for the growth of an international law which will rest on a more solid, stable and effective basis. He accepts the position that it is the lawyer's paramount task to co-operate with politicians, economists, sociologists and scientists in preparing the ground for the "shape of things to come." He touches only very lightly on the question of the positive lines of future international legal development, but the disclosure of defects in the present system is itself an indication of the characteristics which a new system should present.

One puts the pamphlet down with the feeling that it provides a clear and interesting presentation of a subject which is of vital importance to us all at this juncture of the world's history, and with a sense of satisfaction that the price affords no obstacle to its being widely read not only by lawyers but by the general public.

Now is the time for constructive thought on the vital question of the reconstruction of international relations which must be undertaken after the present war with a view to the prevention of any repetition of the tragedies mankind endured from 1914 to 1918 and is again enduring to-day.

During the last twenty-seven years the present writer has consistently maintained that the right line of approach to the prevention of war lies through the establishment of an effective system of international law. Only thus can reliable security be obtained for the maintenance of peace and the supremacy of justice in the relations between nation and nation.

The efficacy of a system of law among nations, as among individuals, depends on the making of provision for the three factors—legislative, judicial, and executive—which are essential to all human government. There must be an authority with power to make the laws and adapt them from time to time to changing needs, an authority to interpret them with precision and apply them to the circumstances of particular cases, and an authority to enforce their observance and execution. Of the three factors the legislative is the most important, for the laws made by the legislative authority must define and control the powers and procedure of the other authorities.

To the achievement of the great task of the organisation of such a system of international justice and law Dr. Friedmann, by his exposition of the futility of the existing international law, brings a new stimulus.

Such a system, if it is to be effective, must be universal.

The need for universality in the operation of the law and in the jurisdiction of the legislative, judicial and executive authorities seems clearly to follow from the fact that the interests of all nations have become, under modern conditions, interdependent.

That the authority exercising the power of making the law should be universal, in the sense that all nations should be entitled to a share in the exercise of the power, seems necessary in order to secure that the law-making shall be conducted justly and with due regard to the needs and interests of all the nations that are to be under the jurisdiction of the law.

That the authority responsible for enforcement of the law should be universal, in the sense of its being entitled under the law to claim the support and co-operation of all nations in the task of enforcement, seems necessary in order to place behind the law the overwhelming power which alone can ensure its observance.

The international law of to-day, however serious its weaknesses and defects, has the advantage that its exponents, while generally at variance as to the nature and effect of its rules, are generally at one in regarding such rules, when ascertained, as being of universal application, and this tradition of universality affords one of the grounds for thinking that the approach to the problem of the prevention of war can best be made through the gateway of a new development of international law.

But Dr. Friedmann appears to doubt the possibility of maintaining the concept of the universality of international law. At page 20 he speaks of a "vertical" split which "has created an abyss between different groups of States and destroyed the social and legal community between them," and at page 45 he says, "The realisation of the increasingly active function of the State, through its control of a growing number of activities in all countries, is bound to lead to the transformation of a loose, but universal, international society to certain more closely-knit blocks of States. Within

these groups political, as well as economic, social, cultural, and consequently legal relations will be very close, and tend to produce eventual merger. On the other hand, relations between one group and another will be much more restricted than in past days." In these and some other passages Dr. Friedmann seems to attach undue weight to the modern changes in political, social, and economic structure and technique of national States, and to the differences in ethical sentiment and outlook of particular States or groups of States, as obstacles to the possibility of effectiveness in an international law claiming universal authority.

It is true enough that all law requires in some degree a common interest and common standard of civilisation and moral values as a foundation, but in judging the possibility of establishing a system of international law that will be both effective and universal it must not be overlooked that international law, in regulating the conduct of nations in their corporate capacity in the interests of general peace and justice, does not need to touch the life and trench upon the freedom of those subject to it at so many points as does national law in dealing with the activities of individuals; nor must it be overlooked that the desire for international peace and justice is almost certainly shared by the vast majority of the men and women of whom the nations are composed. When it is considered how strong and predominant is the common interest of all nations in avoiding the evil consequences that modern war brings upon them, whether they are belligerents or non-belligerents; how greatly the consciousness of that common interest is likely to be accentuated in the minds of all nations after the terrible experiences of the present war; how closely interlocked are the economic interests of all nations and their prospects of future economic improvement; and how much the development of a common standard of moral values is likely to be assisted by the actual existence and functioning of an international organisation resting on the supremacy of international law, the conclusion may well be reached that these considerations afford sufficient foundation for the establishment of an effective system of international law on a universal basis after the present war.

That the task of establishing such a system is one of uncommon difficulty is obvious, but it would be unfortunate, to say the least, if the present generation were to be deterred from undertaking it, or led to face it with undue fear or hesitation, through an exaggerated sense of the obstacles lying in the way of its achievement.

That there will be some States which in future will show themselves aggressive and rebellious against the law is only to be expected, but the larger you make the organised community of nations in which they are comprised the smaller will be the degree of their influence, and the easier the task of their control by the peace-loving majority banded together in the organisation.

A division of the world into closely-knit groups or blocks of States, with restricted relations between them, presents obvious risks of group friction and group wars and loss of the benefits which must flow from universal co-operation for the common good under protection of a universal law.

The system, besides being universal, must be, in principle, democratic. All, or at any rate the vast majority, of the people of all countries stand to suffer, in one way or another, the evil consequences of war and international friction, and it is for their benefit that the new development of international law will be undertaken, and in their interest that the law

will be made, applied and enforced. It is right and proper, therefore, that they should be concerned in the carrying on of the international organisation of which they are the beneficiaries. It has been estimated that the world has a total population of something like two thousand million persons, and it would not be practicable that so vast a constituency, spread over the face of the globe, should directly elect the law-making authority. But they are accustomed to the superintendence of their common interests by their national governments, and it is not impracticable that an international law-making authority should be constituted of representatives of the governments of all the national States, and that the mass of the people in all national States should thus indirectly, through their own governments, exercise a supporting and guiding influence and control over the authority. The spirit and principle of democracy therefore can operate, as a matter of practical politics, in the government of the world community of nations for international purposes, not in the sense of government of all the people, by all the people, for all the people, but in the sense of government of all the nations, by all the nations, for all the nations.

The Joint Declaration which was issued on 14th August, 1941, by President Roosevelt and Mr. Winston Churchill, representing His Majesty's Government in the United Kingdom, expressed certain common principles in the national policies of their respective countries on which they based their hopes for a better future for the world. The principles thus declared seem clearly directed towards the organisation of international action on a universal basis. It is declared that the two countries desire to further, with due respect to their existing obligations, "the enjoyment by all States, great or small, victor or vanquished, of access on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity," and to bring about "the fullest collaboration between all nations in the economic field, with the object of securing for all improved labour standards, economic advancement and social security"; and further, that the two countries hope to see established, after the final destruction of Nazi tyranny, "a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford an assurance that all the men in all the lands may live out their lives in freedom from fear and want," and it is declared that such a peace "should enable all men to traverse the high seas and oceans without hindrance."

It seems clear that the better conditions of international relationship which the Joint Declaration thus envisages can only be brought about through the instrumentality of a system of international law having universal and effective operation and under which some world authority or authorities, acting by reasonable majorities, will have the power and the means to make, apply and enforce a body of international law having a character and content widely different from that of the existing law, whose deficiencies are so ably exposed in Dr. Friedmann's pamphlet.

F. N. KEEN.

THE WAY TO JUSTICE, a Primer of Legal Reform. By HEBER HART, K.C., LL.D. 146 pp. London, George Allen & Unwin, Ltd. **5s.** net.

There is a self-confidence about the title of this book which might put off any but a very naïve person, since philosophers and lawyers have been

seeking this "way" for three thousand years, and the goal is not likely to be reached for, at any rate, a substantial further period. Dr. Hart's book is, however, well worth reading by all those who are interested in the reform of legal procedure in this country. It is not primarily intended for lawyers, but for the educated layman and may be recommended to members of Parliament who too seldom take any real interest or iniative about this important subject. It is indeed a puzzle to know why law reform is so much neglected. Its administration in this country pinches the feet of many citizens. From time to time the business community rouses itself to protest about delays, and this is usually followed by some minor reform, such as that of the "new procedure" instituted a few years ago. Most of the substantial reforms which have taken place in this country, however, have been initiated by the legal profession, which though conservative as a whole has always contained a good proportion of radical members, and it is interesting that some at any rate of the most valuable reforms have been carried through by lawyers who were Conservatives in politics, such as Lord Selborne. Dr. Hart has an interesting chapter on this curious apathy about law reform among the English.

Dr. Hart places codification in the forefront of the necessary reforms, describing it as "the *sine qua non* of a satisfactory system of law and legal procedure." While I agree as to the need for codification, I think that Dr. Hart is much too optimistic about the results. The reduction of the common law to propositions which are intelligible to the man in the street is a superhuman task, but in any case it is unlikely that the draughtsman will try this method. The English technique of codification is already fixed, and the codes already produced are not really useful to any who have not had some legal training. Moreover, the saving of time in cases decided under the existing codes is not so substantial as to enable one to accept Dr. Hart's prophecy as to the probable effects in this direction of codification. The number of authorities which are likely to be cited in a case resulting from a breach of conditions under, shall we say, s. 14 of the Sale of Goods Act, 1893, is certainly much larger than the average number cited in an ordinary common law case. As long as precedents remain authoritative this is bound to be so, and even if their binding effect were to be destroyed their value would hardly diminish. The existence of a clear statement of the law in a code probably tends to cut down litigation. Reported cases on Partnership have become quite scarce since the Partnership Act, 1890, but this may be largely due to the enormous increase in limited companies. Certainly the very detailed provisions of the Companies Act which on the whole contain lucid propositions of law do not seem to have prevented recourse to litigation. I once made some rather cursory researches into the matter and they convinced me that it is really not possible to speak with any reasonable certainty about it.

Dr. Hart's chapter on Codification contains other statements which one would like to discuss if space permitted. I must, however, enter a *caveat* against his assertion that improvements in the law come from the legislature rather than from the judiciary. This is just not true. The common law has been moulded by the judges in a remarkable, and on the whole a satisfactory, manner, and this is the part of the law which touches the average man most nearly. The legislature has seldom intervened, and when it has done so it has been usually under pressure from the legal profession, as in the legislation of the last few years. The actual instance which Dr. Hart gives in support of his view, viz. the reactionary decision

in *Foakes* v. *Beer* (L.R. 9 A.C. 605) really proves the case against him. *Foakes* v. *Beer* was decided according to precedent. Although it has occasioned a good deal of hardship, the legislature has made no move to rectify the position, even since the legal profession in the shape of Lord Wright's Committee urged it strongly to do so.

In his chapter on Court of Civil Justice, Dr. Hart advocates the abolition of the jury and its replacement by a bench of three judges. Actually, of course, the jury has almost disappeared, and it is far from clear that this is altogether to the good. Certainly the law of libel has suffered as much from the vagaries of judges unable to think clearly as from the awards of juries unable to restrain their prejudices. Trial by judge alone is certainly an unsatisfactory method, and its existence in this country is due rather to historical evolution than to any widespread opinion in its favour, except among the judges themselves. Other sensible proposals are the cutting down of appeals, and the decentralisation of High Court system. Certainly on questions of fact there should not be more than one appeal, but it is doubtful policy not to allow further appeals on points of law. There are few countries where there is only one possible appeal, and in those which have a binding system of precedent additional facilities are almost essential.

As to procedure Dr. Hart's most interesting suggestion is that of the preliminary hearing, which as he says was used with success in the Austrian and one division of the German mixed Arbitral Tribunal after the last war; the author was a member of these courts, and speaks from experience. The "new procedure" went some distance in this direction and the practice in the Commercial Court which is very satisfactory is also on the same lines. Given the right judges such a procedure could be worked very effectively, but without that condition being satisfied it is unlikely that the innovation would prove successful. The "new procedure" has proved disappointing to most people, and was abolished after a few, perhaps too short, years of trial.

Dr. Hart thinks that without juries rules of evidence are unnecessary, and advocates their abolition. I think that he exaggerates the importance of these rules in present-day litigation. The necessity for rules of evidence was shown by what happened in Germany when, after their abolition, evidence became so prolix that the judges re-established them informally in their own self-defence. It must, of course, be admitted that the whole subject of evidence needs very thorough investigation—as, I think, upon other lines than those suggested in this book.

Dr. Hart expresses the view that there is little adverse intrusion of the administration of the criminal law—I find this rather difficult to accept. He nevertheless among some sensible and generally acceptable proposals, such as that courts of summary jurisdiction should always have trained chairmen, makes a number of revolutionary and very dubious suggestions. He would like, for example, to carry his vendetta against the jury into the domain of criminal law; also to abolish the presumption of innocence. He thinks that the maxim, "it is better that ten guilty men should escape than one innocent man should be convicted," is stuff and nonsense. Again, he favours the dangerous continental practice of encouraging the judge to work with the prosecution. The value of this chapter is that it compels one to reconsider a number of established principles—prejudices Dr. Hart would call them—of criminal justice. Having done so I for one am content to allow most of them to stand.

Dr. Hart thinks that the establishment of a Ministry of Justice is an essential preliminary to any thoroughgoing programme of legal reform, a view with which I entirely agree. His chapter on this subject though short is fruitful and in it he makes some new points. He then has a few withering pages on the present position of education for the Bar, and finishes the book with a chapter on the simplification of the law. Dr. Hart's mind is essentially of a practical type and he does not move easily among the concepts of jurisprudence. Everybody will sympathise with his desire to simplify the law, and indeed will agree with him that substantial simplification is possible—the movement for codification is largely based upon this fact. One must confess, however, that the proposals here made are rather *jejeune*, and, seeing that they are addressed to laymen rather than lawyers, even dangerous.

No book which is as thought provoking as this can fail to do good, and for that even more than for the many sensible proposals it contains, it can be thoroughly recommended.

R. S. T. Chorley.

THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941. By G. Granville Slack, B.A., LL.M. London: Butterworth & Co., Ltd. 104 pp. **7s. 6d.**

This book brings within the same covers the annotated versions of the Act and of the Rules made under it which have already appeared in the publisher's Emergency Legislation Service. The main advantage of treating a practical branch of the law by way of statute annotation lies normally in the opportunity allowed for compact discussion of the statutory provision in the context of its interpretative judicial and academic accretions. The shifting, Vallambrosan profusion of emergency law is not so amenable to these mellowing influences and demands exegesis of a new kind.

A certain penny pamphlet on the Essential Works (General Provisions) Order has had sales which would turn most best-sellers green with envy. It is not merely that lawyers cannot hope to digest war-time law, as it appears, at their leisure, but that a whole new public with no formal legal training, hordes of officials, and, beyond these, citizens whose lives these laws penetrate in detail, is concerned with their effect. The first desideratum, therefore, is the utmost simplicity without loss of accuracy, and Mr. Slack goes far to achieve it. There is one misleading comment on p. 20, where the note begins: "Where it is not possible to make a scheme of arrangement—then the assistance of the court may be sought in what are termed 'liabilities adjustment proceedings.'" The innuendo, that the attempt at a scheme of arrangement is a condition precedent to adjustment proceedings, is false. There is nothing to prevent the application being made to the court in the first instance. The notes to each section are self-contained, which involves a good deal of repetition, and each subsection is ruthlessly pursued. The note, for example, to s. 11 (1) (which in itself could hardly be clearer) out of necessity simply repeats the subsection. All this is only to indicate that the method is highly uneconomical; but it should very successfully fulfil its object of providing guidance for the most faltering feet.

The second desirable feature is the explanation of referential incorporations. The current splenetic reflex to the mention of legislation by reference is a sad example of how subjective inconvenience may raise a passion

blinding reason. Making one rule do for two is sound jurisprudence, and it is illogical for the lawyer, the true source of whose embarrassment is his ignorance of the one, to imagine he would be better off had he two to remember. However, no one who reads Mr. Slack's notes need remain tantalized. He gives admirably clear explanations of the numerous references to bankruptcy law and county court procedure and draws the attention to parallels with extraneous law even where there has been no specific incorporation. The whole is fortified with references to *Halsbury* which have been checked and found accurate.

A third aim in this kind of annotation should be to indicate how the new statute locks into the surrounding legal jigsaw. The first ten pages of the book are taken up with a "Preliminary Note" which summarises the Act. It is too long to be a real summary, and as a commentary on a commentary is quite superfluous. The space would be better employed for a short "Compleat War-Debtor," a miniature of the position of debtors under the Courts (Emergency Powers) Acts, the Defence (Evacuated Areas) Regulations, and this Act, with perhaps a word on the relation between these and bankruptcy.

A few minor slips might be corrected in another edition. On p. 10, "s. 26 (3)" should be "s. 24 (3)"; on p. 16, "disobedience of" should be "disobedience to"; on p. 55 there are two spelling misprints; on p. 82 "s. 163 (4) of the Companies Act" should be "s. 163 (3) of the Companies Act."

Readers of a note dealing with the Act elsewhere in this issue may find the publisher's puff title "The Debtor's Charter" somewhat over-enthusiastic.

M. FINER.

WORKERS' PROTECTIVE LEGISLATION IN POLAND. Twenty Years' Co-operation with the International Labour Organisation. With Preface by JAN STANCZYK, *Polish Minister of Labour*. **3d.**

The comparative study of labour legislation is one of the contributions which the legal profession can make to the fulfilment of the promises inherent in the Atlantic Charter. The Polish Government deserve the gratitude of those interested in labour law for this small publication which gives a comprehensive survey of the labour legislation enacted in Poland between 1919 and 1939 and, in a concluding chapter, the distressing and shameful story of its destruction by the Nazis. The pamphlet ends with the emphatic pronouncement "that the victory of these (the democratic) forces must be followed, not only by the restoration of national independence, but also by complete social justice and by the establishment of a system of economic planning on a world scale."

O. K.-F.